TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 58

BLANCHE DICK, PETITIONER,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 22, 1953
CERTIORARI GRANTED JUNE 22, 1953

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[fol.]

IN DISTRICT COURT, THIRD JUDICIAL DISTRICT FOR THE STATE OF NORTH DAKOTA COUNTY OF RANSOM

BLANCHE DICK, Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, Defendant.

COMPLAINT—Filed November 4, 1955

The plaintiff complains of the defendant and for a cause of action alleges:

I.

That the defendant at all times herein mentioned was and now is a foreign corporation, doing business under the laws of the State of North Dakota.

II.

That on the 4th day of August, 1944, in consideration of the payment of the premium of $110.80 (including $5.15 and $4.33 for Double Indemnity Benefit and Waiver of Premium Benefit, respectively) annually during the term of the policy, the defendant, by its agents duly authorized thereto, executed its policy of life insurance number 20 024 584 in writing to one William Dick, on his life, in the sum of $2500.00 (the face amount of the policy) and $5000.00 (double the face amount of the policy if death of insured resulted, before the maturity date, from accidental means as provided by the policy), a copy of which policy is hereto annexed, marked Exhibit "A", and made a part of this complaint.

III.

That on the 19th day of May, 1949, in consideration of the payment of the premium of $260.15 (including $7.40

and $11.20 for the Accidental Means Death Benefit and the Waiver of Premium Benefit, respectively) annually during the term of the policy, the defendant, by its agents duly authorized thereto, executed its policy of life insurance [fol. 2] number 21 435 726 in writing to one William Dick, on his life, in the sum of $5000.00 (the face amount of the policy) and $10,000.00 (double the face amount of the policy if death of insured resulted, before the maturity date, from accidental means as provided by the policy), a copy of which policy is hereto annexed, marked Exhibit "B", and made a part of this complaint.

IV.

That the plaintiff, Blanche Dick, is the wife of William Dick, now deceased, and the beneficiary named in policies numbered 20 024 584 and 21 435 726, both on the life of William Dick, and above referred to.

V.

That on the 20th day of January, 1955, said William Dick died, which death resulted directly, and independently from all other causes, from bodily injury effected solely through external, violent and accidental means as limited and defined in the double indemnity benefit provisions of both policies hereinbefore referred to and attached to this complaint, to-wit, by the accidental discharging of a double-barreled shot gun which was being handled by the decedent in or near a barn on his farm in Alleghany Township, Ransom County, North Dakota, and occurred on the day of injury, while both policies hereinbefore referred to were in full force and effect, prior to the maturity of either policy, the insured being of the age of forty-seven years.

VI.

That after the death of decedent, and on the 27th day of January, 1955, plaintiff gave to defendant through its agent, Fred Hanna of Lisbon, North Dakota, notice of death of said insured, which notice was marked as received at the Fargo Branch of N. Y. Life Insurance Company on February 1, 1955.

VII.

That on and after May 19, 1955, the plaintiff did, by her attorney, give the defendant particulars of the death of the insured and did in writing demand payment under the double indemnity clauses of the policies above referred to, but that the defendant has refused to consider such de-[fol. 3] mands with favor and has offered only to pay the face value of said policies upon surrender of said policies by the plaintiff.

VIII.

That under the terms of said policy number 20 024 584, $5,000.00 is due from defendant to plaintiff, being $2500.00 face value of the policy and $2500.00 under the double indemnity provisions of said policy, and the defendant has not paid said sum or any part thereof, and the same is now owing and unpaid from defendant to plaintiff.

IX.

That under the terms of said policy number 21 435 726, $10,000.00 is due from defendant to plaintiff, being $5,000.00 face value of the policy and $5,000.00 under the double indemnity provisions of said policy, and the defendant has not paid said sum or any part thereof, and the same is now owing and unpaid from defendant to plaintiff.

Wherefore, plaintiff prays judgment against defendant in the sum of $15,000.00, together with such dividends or other benefits as may have accrued under the terms of said policies, and for costs of suit.

Dated at Lisbon, North Dakota, this 22 day of October, 1955.

Holand & Stetson, Lisbon, North Dakota.

(Verification.)

[fol. 4]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Civil No. 3187

BLANCHE DICK, Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation, Defendant.

ANSWER—Filed November 9, 1955

For answer to the complaint, defendant alleges:

I.

Admits paragraphs I and IV of said complaint.

II.

Admits the issuance and delivery to William Dick, the insured, of the two policies of insurance referred to in paragraphs II and III of said complaint, substantially in the form of the copies of said policies of insurance attached to the complaint as Exhibits "A" and "B".

III.

Admits that William Dick died on January 20, 1955, at his farm home in Alleghany Township, Ransom County, North Dakota, and that on or about January 27, 1955, plaintiff gave notice to defendant of the death of said insured, and thereafter plaintiff made claim for the single and double indemnity benefits provided for in said policies.

IV.

Defendant specifically denies that the death of said insured resulted directly, and independently from all other

[fol. 5] causes, from bodily injury effected solely through external, violent and accidental means, as is alleged in the complaint.

V.

Defendant admits that there is payable upon said policies of insurance the following amounts:

Upon the Policy No. 20 024 584 the face amount of $2,500.00, postmortem dividend of $12.90, premium adjustment mortuary of $54.54, and interest from January 20, 1955, to February 23, 1955, of $12.16, making the total payable on said policy of $2,579.60.

Upon Policy No. 21 435 726 the face amount of $5,000.00, postmortem dividend of $28.88, premium adjustment mortuary of $65.04, and interest from January 20th, 1955 to February 23, 1955, of $14.21, making the total payable on said policy of $5,108.13.

VI.

That on or about February 23, 1955, the defendant tendered and offered to pay to the plaintiff the full amount due on said policies of insurance as above set forth, but that said plaintiff refused and ever since has refused to accept the amount so tendered to her.

VII.

Excepting as hereinbefore specifically admitted, qualified or otherwise explained, defendant denies generally and specifically each and every allegation, matter and thing in said complaint contained and the whole thereof.

VIII.

For affirmative defense, defendant alleges that said policies of insurance provided that the double indemnity benefit referred to therein shall be payable only upon receipt of due proof that the death of the insured "resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means," and further provided that such double indemnity benefit shall not be payable if the insured's death

resulted from "self-destruction, whether sane or insane." Defendant alleges that the death of said William Dick, the [fol. 6] insured, resulted from suicide or self-destruction and by reason thereof no additional indemnity is payable by defendant to plaintiff under said policies of insurance.

Wherefore, defendant prays judgment as follows:

1. That the Court adjudge and determine that the plaintiff is not entitled to recover from the defendant any amount in excess of the sum of $7,687.73 which defendant admits to be due and owing upon said policies of insurance.

2. That defendant recover of the plaintiff its costs and disbursements herein.

3. That defendant have such other and further relief in the premises to which it may be entitled.

Dated this 8th day of November, 1955.

Norman G. Tenneson, A member of the firm of Cupler, Tenneson, Serkland & Leahy, 63½ Broadway, Fargo, North Dakota, Attorneys for Defendant.

[fol. 7]

IN UNITED STATES DISTRICT COURT

Transcript of Testimony

Testimony for Plaintiff

ARNOLD SEIM:

I work for the Soil Conservation Service, Department of Agriculture, and have had experience in preparing mechanical drawings. I prepared Plaintiff's Exhibit No. 1, a replica of the silage shed on the Dick farm. This shed is located between the barn and the silo. It is drawn to scale, 1/6th of the original size, 2 inches representing one foot. The inside width of the shed is 7 feet. One side is 12 feet 6 inches long and the other 12 feet 5 inches. The studdings, doors and steps are also drawn to scale.

The outside door faces to the south. The barn is east of the silo shed, with the doorway with the steps opening up into the barn itself. On the west side of the shed is the silo.

There was a lock on the outside of the south door. The one on the inside is missing and the door can only be opened from the outside. There is a regular barn lock on both sides of the door leading into the barn.

MRS. WILLIAM DICK:

Direct examination.

Plaintiff's Exhibit No. 2 is an exact copy of the double indemnity life insurance policy in the sum of $2,500 issued by defendant to William Dick on August 4, 1944, and Plaintiff's Exhibit 3 is an exact copy of the double indemnity life policy in the sum of $5,000 issued by defendant to William Dick on May 19, 1949. Both policies were received in evidence.

Both of said policies provide that the double indemnity benefits shall be payable only upon receipt of due proof that the death of the insured "resulted directly and independently of all other causes, from bodily injury effected solely through external, violent and accidental means" and that such double indemnity benefit shall not be payable if the insured's death resulted from "self-destruction, whether sane or insane."

[fol. 8] I now live at Elliott, North Dakota. Before moving there I lived with my husband, William Dick, on a farm located about 5½ miles southwest of Elliott. We were married in 1926. Five children were born to us. One child, Dorothy, age 16, lives at home with us. At the time of her father's death she was attending high school in Elliott.

Our farm comprises 6 quarter sections of land. Mr. Dick operated the farm with the help of his oldest son. We raised about 100 sheep on the farm and had that many at the time of Mr. Dick's death on January 20, 1955.

The evening before his death, we purchased ice cream in Elliott, returning to the farm about 11:00 o'clock p.m. We ate the ice cream and watched television. Dorothy was there. Mr. Dick helped Dorothy with her homework. We

went to bed when the television went off, after midnight. Mr. Dick slept soundly that night. He rose on January 20th, between 6:30 and 7:00 o'clock as he was supposed to help his cousin make bologna that day. I made breakfast for the three of us. He ate a good breakfast. I didn't notice anything odd or out of the way in his manner or attitude that morning. We talked about what we had to do that day and that we should get an early start. I drove Dorothy to school about 8:30 that morning. Mr. Dick backed the car out of the garage. Dorothy said goodbye to her father when we left.

Mr. Dick had done the milking before breakfast and had separated the milk. The milk for the pigs was sitting by the gate when he backed the car out. He was in the process of taking it to the barn when we left.

I was gone about a half hour. When I returned the milk pails were sitting on the porch. I did the work, the dishes and separator, and straightened up the house a little. I got the tub to be used in the sausage making cleaned up. We were going to go to his cousin's house about 2½-3 miles from our farm.

I got myself ready and I thought he should be coming in. I thought I would go out and let him know we should be going. I went out to the barn to look for my husband. I opened the door and called to him but there was no answer. I then walked into the barn as I thought he could be [fol. 9] throwing down silage for the evening. From the barn I walked west and into the little silage shed. I don't know whether the door was open or closed.

When I walked into the shed I saw him (Mr. Dick) lying there. He was lying on his back with his feet facing the door of the shed on the south. I saw the wounds on his head and knew he was dead. I ran back to the house and called up his brother, George, who lives about ¼ of a mile east. He came right down. Fred Hanna, agent for the New York Life Insurance Company who sold Mr. Dick the policies, was at my brother-in-law's farm at the time and they came together. I told George to go out to the barn, which he did.

Mr. Dick was 47 years old at the time of his death. He was a well man and a happy man. We got along well

together. He got along good with his children and fine with his neighbors. He belonged to a church. He was 5 feet 7 inches tall and weighed about 165 pounds. He was a man of good habits.

There are 4 quarter sections on the home farm on which there was no mortgage. The machinery was all paid for except the combine. On January 19, 1955, Mr. Dick had $986.36 on deposit in the Farmers State Bank of Lisbon. He left no Will. We owed nothing but current bills.

Several months prior to his death my husband had trouble with vicious dogs. A few sheep were lost and quite a few hurt. He also mentioned seeing a fox out in the lot and mentioned the badger they had gotten. Mr. Dick had a double-barreled shot gun on the farm. I don't know the make or gauge. I think it was kept in the barn. I don't know where at. He did a good deal of hunting and I went with him every fall hunting pheasants. He took this gun with him which he used. I saw this gun lying there when I came out of the barn into the shed but cannot tell how it was lying. That morning my husband wore a blue overall with a blue jacket. He was wearing gloves which he was wearing while lying there.

[fol. 10] Plaintiff's Exhibit No. 7 is a photo of the silo and barn. It shows to the south side of the shed between the silo and the barn.

To open the south door of the silo shed from the inside you had to use a screwdriver as the knob was off. There was a screwdriver kept in the shed for that purpose.

My husband was interested in fishing and hunting. The children and I have gone fishing with him.

Cross examination.

When I went out to the barn, I entered through the main or north door and walked until I came to the east door of the shed. I don't know whether this door or the south door of the silo was open or closed.

Before going to the barn I heard no shots from a shot gun. I didn't notice a screwdriver near the gun. My husband owned only one shot gun. I didn't stay long in the shed but ran to the house.

In addition to the home farm of 4 quarters, my husband owned 2 quarters of land. There was a mortgage on one of these quarters. It could have been $6,000—I just don't remember.

At the time of his death my husband wore an outer jacket. Under that he wore overalls and a red checkered flannel shirt. He also wore a union underwear suit.

After my husband's death the gun and clothing were taken into the possession of the sheriff.

My husband was experienced in the use of firearms. He did a little hunting every fall since 1926, for pheasants, deer, ducks and geese. I have never handled Mr. Dick's gun. I suppose it has 2 triggers. He never owned any other shotgun that I know of.

My husband had been going to a doctor prior to his death, for a check-up. He went to Dr. Veitch of Lisbon. He saw the doctor twice in December of 1954. He wanted a check-up. He had prostate trouble which bothered him a little but it wasn't bad. I know of two trips to the doctor because I was along with him. He could have seen the doctor when I wasn't along.

PLAINTIFF'S EXHIBIT 7

[fol. 12] On January 20, 1955, the sheep were kept in a pasture south of and just right behind the barn.

I discovered my husband's body between 10:30 and 11:00 a.m.

I filed a claim with the defendant insurance company to recover benefits under the policies. Defendant's Exhibit No. 8 (claimant's proof of death) was signed by me on January 27, 1955, at the farm. Fred Hanna, the company's agent, brought it out. He read the exhibit to me. It provides that I furnish a written statement from each physician who examined or treated the deceased during the last three years prior to death. I know a statement was furnished by Dr. Veitch to the insurance company.

I employed Mr. Holand, an attorney at Lisbon, to represent me in connection with the claim against the defendant for double indemnity. I gave him the policies. He carried on correspondence with the New York Life Insurance Company. He told me the company was not satisfied from the proofs that the death was accidental.

Redirect examination.

When my husband went hunting he sometimes picked up his father's gun because he didn't trust his own (the double-barreled gun). Sometimes it wouldn't fire when he wanted it to, or it would when he didn't.

During all of our married life, Mr. Dick never said anything to me about committing suicide.

Recross examination.

I was present when the double barrel wouldn't fire. I have no personal knowledge that it went off when it wasn't fired.

GEORGE DICK:

Direct examination.

I am William Dick's youngest brother. My occupation is farming. Mrs. Dick called me on the telephone when she found her husband's body. Fred Hanna was at my home and accompanied me to the William Dick farm. We arrived somewhere around 10:30 a.m. I first went to the

house, staying just long enough for Mrs. Dick to tell us something was wrong in the barn and we should go out [fol. 13] there. We went to the east door of the silo shed, Plaintiff's Exhibit No. 1. I don't remember whether the door was open or closed. We didn't step down into the room but stood on the edge looking down into the shed. We saw Bill lying there with his head to the northwest and his feet to the southeast. His left foot was lying on the floor of the shed and his right one was sort of cocked against a 2 x 4 immediately east of the door opening to the south.

It was obvious that he was dead. His forehead was completely gone, the eyes were gone and then back to the hairline.

There was just a sprinkle of silage on the floor of the shed and some on the steps. It was wet, more or less froze.

About two days later I made an examination of the shed to determine whether there were any shotgun pellets lodged in the walls or ceiling of the shed. There was a concentration of pellets in the northwest corner of the shed which I have marked with an "X" on Plaintiff's Exhibit 1. There were about a hundred pellets. There was also marks of shot in the southeast corner on the east wall south of the door, 3 or 4 feet from the floor. I put a "Y" in the middle of that marking on Plaintiff's Exhibit 1. There were pieces of human flesh mostly on the south door but some above too on the roof, spattered all around. There was a good deal of blood on the floor.

The witness then located the silage pasture. It is fenced and extends north of the shed about 50 to 75 feet. It is used to feed fat cattle. There are feed bunks extending from the northwest corner of the shed in a northerly direction about 50 feet. My brother's regular practice was to put silage in the bunks, then get a tub full of ground corn and mixture of feed (oats or barley) and spread it over the silage. He used a bushel and a half galvanized tin basket. The morning of my brother's death when I arrived this basket was filled with corn. It was 6 or 8 feet from the feed bunks. The cattle were eating silage out of these bunks.

My brother got along very well with his wife and children. He was pretty jolly all the time. He was very seldom

a moody man. "If he had anything on his chest, he would get it off and forget about it." He was a husky, strong man. He had many friends.

[fol. 14] Cross examination.

Defendant's Exhibit No. 11 is a picture taken a few days after January 20 showing myself lying on the floor of the shed in the position in which my brother's body was found. It was taken from the east doorway of the shed and shows the south door. A stick in the lower right-hand corner is supposed to represent the gun that was lying there. It was about 3 feet from the body. The butt of the gun was near the feet and the barrel alongside of the head.

I later learned that 2 shells found in the gun had been exploded. It was a double barrel, twelve gauge shotgun with two triggers, one in back of the other. I don't know the make. My brother had owned it close to 20 years. I did not see a screwdriver near the body.

When we saw the body he had on a blue bib overall, yellow flannel gloves, and a blue or sort of grayish work jacket with a zipper.

I have gone hunting with my brother. He seemed to be very careful in the use of a shotgun. He hunted quite a lot, practically every fall, and used this gun frequently.

"Q. Your brother was moody at times, was he not?

A. Very few times.

Q. Well, he was, wasn't he?

A. And if he was, very short times.

Q. And those moods came to him rather suddenly, didn't they?

A. Well, not always.

Q. Well, sometimes, isn't that true?

A. Well, it would happen to anybody.

Q. Well, he was somewhat impulsive, was he not?

A. What do you mean by 'impulsive'?

Q. Well, you said if he had anything bothering him, he got it off his chest quickly. I would judge from that he was impulsive, would that be correct?

A. Well, he wouldn't exactly fly off the handle like a madman, but he wanted to get it straightened out when he had a little something to think about or was troubled, anything like that."

[fol. 15]

PLAINTIFF'S EXHIBIT 11

Dick, William
Death Claim
Claim # 791 352

Showing approximate position of body in sileage shed when found. Posed by Geo. Dick, brother of insured. Stick shown on left indicate approximate position of gun. Picture taken from doorway leading into barn from shed.

[fol. 16] Redirect examination.

When I said on cross examination that my brother was on occasions moody and impulsive, I don't belive (sic) it meant that he would keep things within himself and brood about things. I didn't mean it to sound like that. When he had a problem he wouldn't brood about it but would get it out of the way. I would say he looked on the light side of things. He was jolly, very much so.

JAMES DICK:

Direct examination.

I am 26 years old, single, a farmer and live 2 miles south and about a quarter of a mile west of the William Dick farm. He is my uncle. Mrs. Dick called our house and said something happened and someone should come over. I went right over. William Dick's body was still in the shed. He was lying on the floor in the same position as stated by George Dick. His cap was lying on the floor. He had his rubbers or overshoes on; also his gloves on. The gun was lying by the side of the body. It wasn't extremely cold but like it usually is in the winter.

I saw the tub filled with ground corn in the silage yard. It was a couple of steps east of the feed bunks and plumb filled with ground corn with a little snow on it.

My uncle had trouble with vicious dogs getting at his sheep. Within a year prior to his death the dogs had killed or chewed up about 30 sheep one night.

"Mr. Tenneson: Now, we move, if the Court please, that the answer be stricken as too remote and indefinite as to time as to have no probative value whatever in this lawsuit, tending to confuse the jury.

Mr. Vogel: And I take the position, your Honor, that it does have probative value; that the evidence has been established to show that this man had 100 head of sheep on his farm at the time of his death and a very short period of time, which is before his death, the sheep were attacked by the dogs; and now the witness has testified that within a year prior to his death the dogs got in and [fol. 17] mutilated 20 or 30 of those sheep. Now, under the

circumstances it appears to me that it is very relevant, and I resist the motion.

The Court: Was that a motion to strike or an objection?

Mr. Tenneson: Yes, a motion to strike the testimony.

The Court: The motion to strike is overruled. You are reasonably sure, Mr. Dick, that what you speak of occurred within a year or so of your uncle's death?

The Witness: I am reasonably sure. The reason that it is hard—like if it would have just happened once, I could have recalled it more specifically, but he had had trouble, he had a lot of trouble there because of the lay of the land and situation of the farm in relation to other farms. He had a lot of trouble."

I saw my uncle occasionally the last three or four months before his death. He was himself, the way he always was, jolly. He was very friendly with his neighbors, was well liked. He would look on the light side of things always. He got along very well with his wife and children.

Cross examination.

I didn't see my uncle fill the basket with corn. It was filled after he had fed silage because it was in his silage tub. He fed the silage first.

The gun was lying to the left of the body as he laid there on his back. It was pretty much parallel with the body about 2 feet away. The stock was by his legs and the muzzle about level with his shoulder.

Redirect examination.

My uncle's custom in fattening cattle on silage was to put in the silage and then put the corn right on top. That morning the cattle were just cleaning up the cobs and the stalks which is the last they will eat. They had been fed.

[fol. 18] DOROTHY DICK:

Direct examination.

I am 16 years old, the daughter of William and Blanche Dick, and live with my mother in Elliott.

The evening before my father's death, he had some ice cream. I was 14, a freshman in high school. He helped me with a school problem, explaining the definition of a transformer in General Science. He explained by the drawings in my book how it worked.

I did not notice anything different or unusual about his attitude that evening. The following morning we all had breakfast together. I noticed nothing different or unusual about my father that morning. My mother took me to school in the automobile. I remember waving to father. There was nothing unusual about the goodbye to him. My father was a lively; a jolly man.

Testimony for Defendant

W. C. NOICE:

Direct examination.

I live at Lisbon, North Dakota, and am sheriff of Ransom County. I was sheriff on January 20, 1955.

I first heard of the death of William Dick about 10:30 on the morning of his death by a call to my office from Dr. Veitch, the coroner for Ransom County. We went to the farm together arriving there approximately 11:00 o'clock. We first went through the main door to the shed leading from the barn to the silo—the east door. We entered at about the same time. I observed William Dick lying on his back or nearly so. His head was in the direction of the silo proper with his feet in the direction of the door leading from the silo shed to the outside.

I did not observe any wounds on the body then but on the head. The full top of his head was torn off. It appeared that his eyes and the frontal part of his head were torn away from the head. "I observed a powder burn which appeared to be a powder—which I believed to be a powder [fol. 19] burn above the left ear, about an inch above the left ear." Defendant's Exhibit 11 is a picture which shows about the same position of the body as I saw it. There was some silage on the floor, not very much. The gun was near the body, probably about 18 inches. The stock of the barrel

was toward his feet with the barrel along his body. The end of the muzzle was at about his chest. I took possession of the gun on January 20th. It has been in my possession ever since then. It is a twelve gauge, double barrel Stevens with two triggers placed one ahead of the other. The front trigger fires the right barrel and the left trigger the left barrel. It weighs about seven pounds. Defendant's Exhibit 12 is identified by the witness as the gun which he found alongside the body. There is a safety device on the gun located on top of the stock behind the barrels and behind the device which breaks the gun. (The witness cocked the gun, then closed it. He pulled the triggers but was unable to explode either trigger as the safety was on.) To fire the gun you must release the safety which is done by pressing it forward. The witness breaks the gun.

"Q. Will you break it again? Now, is it on safe?

A. It is on safe now.

Q. It is on safe. There is a small 's' marked in there, is there not?

A. Yes, sir.

Q. Which indicates to anybody looking down that the gun is on safe, does it not?

A. Right.

Q. Now, in order to fire the barrels what must you do?

A. You must press this ahead.

Q. Push that button ahead?

A. Yes, sir.

Q. Will you do so?

A. Yes, sir.

Q. Will you fire the barrels?

A. Yes, sir (indicating)."

In the course of my investigation I made certain tests with the gun. With the gun off safe I held it with the muzzle pointed toward the ground. Then I dropped it so that it hit a board on the concrete. It was dropped a distance of about ten inches. I did this probably ten times and the triggers did not fire.

I then held the gun with the butt down about ten inches from the floor and dropped it to a board eight or ten times. The triggers didn't release or fire. There were no shells in the gun during these tests.

[fol. 20] I also placed the gun in the normal shooting position against my right shoulder with the barrel in my left hand and the stock in my right hand and hit it against an obstacle which was a board. I did this three or four times with the result that it didn't release the triggers. All of these tests were made with the safe off and the gun in firing position.

I made a test of the trigger pull. Mr. Johnson, a representative of the defendant company, assisted me. We hooked a spring scale to one of the triggers, one holding the gun and the other the scale to determine how many pounds pull it took to fire the gun. We tried it twice with both triggers. It required seven pounds approximately. There was a little difference in the two tests, probably seven and a half pounds, something on that order.

I also placed the butt on the floor and let the barrel fall on a board. I did that once wth the gun in firing position. It did not discharge or release the trigger.

After making my examination in the shed, I picked up the gun and broke it. I found two discharged 12-gauge shells in the chambers. I removed them from the gun. These exploded shells are Defendant's Exhibits Nos. 13 and 14. I took into my possession the clothing worn by Mr. Dick at the time of his death and have it here pursuant to subpoena. I found two 12-gauge shells in the pocket of the outer jacket. They had not been fired. While in the silage shed I observed a screwdriver located about eight or ten inches from the barrel of the gun and to the left of it. The screwdriver was eight to ten inches long. I do not have it in my possession and do not know where it is. I made an effort to find it without success.

When I picked up the gun in the shed it was dry and clean except for the fact that it laid in the silage. A little might have got on it there.

I noticed that tissue from Mr. Dick's head was in the southeast corner partly on the outside door and the east wall. It covered an area of five or six feet, most of it four to five feet from the ground. There were shot particles on the wall in several different places, probably six or eight feet from the door leading in from the barn, on the east [fol. 21] side of the shed. I didn't see any shot on the

north wall. There appeared to be shot penetration on the south wall which looked like it might have happened sometime before that.

There was a cap lying on the ground on Mr. Dick's right side near the wall to the right of his head.

About an hour after the body was removed to the Lozier Funeral Parlors in Lisbon, I observed a wound on Mr. Dick's body.

"The Witness: Yes, sir.

This wound on the left side of Mr. Dick was located, as I measured it, three inches, the top of it, that is the part toward the top of his body was three inches from the left nipple. The top of it was eleven and a half inches to the top of his shoulder on his left shoulder. It was approximately, from the center of this wound to the center of his breastbone, four inches. It was from the heel of his left foot to the bottom of the wound three feet seven and a half inches. The length of the wound was five inches. The widest part of the wound was two and three-quarters inches. It was—I call it pear shape, slightly larger at the bottom of the wound than at the top."

Defendant's Exhibit No. 17 is a photograph of Mr. Dick's body taken about 2 hours after the body was brought to the funeral home.

Defendant's Exhibits Nos. 18 through 23 inclusive is the clothing worn by William Dick at the time of his death.

Cross examination.

I don't believe Janu[illegible] 20th was a very cold day.

I don't remember whether Mr. Dick was wearing overshoes. I examined Mr. Dick's cap. There were no markings of any kind on it. I didn't bring it to the sheriff's office. As I recall the screwdriver was from eight to ten inches long. I may have told Mr. Holand (plaintiff's attorney) I estimated it was about six inches long. It could have been six inches long or somewhat longer than that. I don't know what it had been used for.

I have known William Dick since he was a young boy. He was a fine man.

[fol. 22] That morning in the shed I didn't know about the wound in his side.

I didn't make a careful and minute investigation of the northwest wall to determine whether there was a considerable concentration of shot there. There may have been shot along the north wall.

The tests with the gun were made in the basement of the court house in Lisbon. It was warm there. There were no shells in the gun when I made the tests. I don't pretend to be an expert as far as shotguns are concerned. I borrowed the scale from one of the hardware stores. It is a little spring scale you hold by a ring on the end and the spring runs along the side with a hook on the end. I made this test twice. The tests varied a fraction of a pound.

As Mr. Dick was lying there, the gloves were on his hands.

The gunshot wound in the side grazed the ribs. The pellets did go in through the ribs or by the ribs, between the ribs into the body. There are two holes in Mr. Dick's shirt, Defendant's Exhibit 19. I wouldn't know if the holes correspond to the position of the wound on the left side of the body. The wound was larger and lower on the back side than it was on the front side. It did not come across the body in a horizontal position but extended from a position that was low toward the back and higher toward the front. On January 28, 1955, I testified at Lisbon that it appeared the charge was up from the floor into the body rather than into the body from an upward position because the wound is larger at the bottom than it is at the top side. By that testimony I meant that it (the charge) started from the position of the ground rather than by holding the gun in the air. That is my observation, what I thought might have been the case.

I don't know how many pellets there are in one of these shells. There could be 150. I think it is more than that but I wouldn't say. It depends on the shot size. These shells were six shot.

There were two holes in the outside jacket which are in the same general location as those in the shirt. This would indicate the wound along the left side was more or less of [fol. 23] a grazing wound. I wouldn't know if any shot

got into the chest wall itself. I wouldn't say there had been any swelling of the body when I took the measurements.

There was a small amount of silage on the floor of the shed and very little, if there was any, on the steps from the barn proper to the shed. The steps appeared to be in good usable condition. I had the impression there were three steps instead of two but I may be wrong on it now.

On January 28, 1955, I testified that Mr. Dick's arm was partially outstretched and the gun was near the left hand. I said I first thought the gun was laying over his hand but wouldn't want to say whether it was or not.

"Mr. Vogel: What I am getting at, Mr. Noice, is this: One of the witnesses has testified that on the northwest wall of the building here there was a considerable concentration of shot, and I am asking you whether or not you made a careful and a minute investigation of this wall to determine whether that was true or not.

Witness: No.

Mr. Vogel: You didn't make the investigation?

Witness: No.

Mr. Vogel: You would not say that there were not shot along the north wall?

Witness: No, sir, I would not. May have been."

DR. ARNER VEITCH:

Direct examination.

I am a physician and surgeon practicing at Lisbon, North Dakota. I was admitted to practice in North Dakota in 1932 and have actively practiced in Lisbon since October 1945. I was county coroner in Ransom County on January 20, 1955. In the course of my official duties I made an investigation of the death of William Dick. I learned of the death by a phone call from Fred Hanna. Mr. Noice, the sheriff, and I went to the Dick farm together.

We opened the door from the barn to the silo shed and saw the body of William Dick. It was lying on its back with the head to the west and the feet in contact with the outside door to the south. The long length of the body was [fol. 24] northwest to southeast. The forehead and eyes

were gone. The bone and tissue in front of the ears were gone, with the brain contents there in plain sight. I did not observe any other wounds at that time. The body was more, probably a foot to 18 inches further west than where the picture, Defendant's Exhibit 11, shows it to be. The cap was lying clear and upside down on the silage probably an arm's length from the waist. The gun was on the left side of the body with the stock toward the feet and the barrels toward the head and 8 to 12 inches away and in about the same axis or plane. The screwdriver, eight to ten inches long, was further away from the body than the gun and about in the same line as the cap. There was some red meat tissue or blood splatter on the south door and also on the north wall. The area of greatest concentration was the south door.

I inspected the shed again on January 24th. We found holes that B-B's might make all over the north and east walls mostly on the upper half of the wall. I did not find any shot pellets as I didn't dig any of them out.

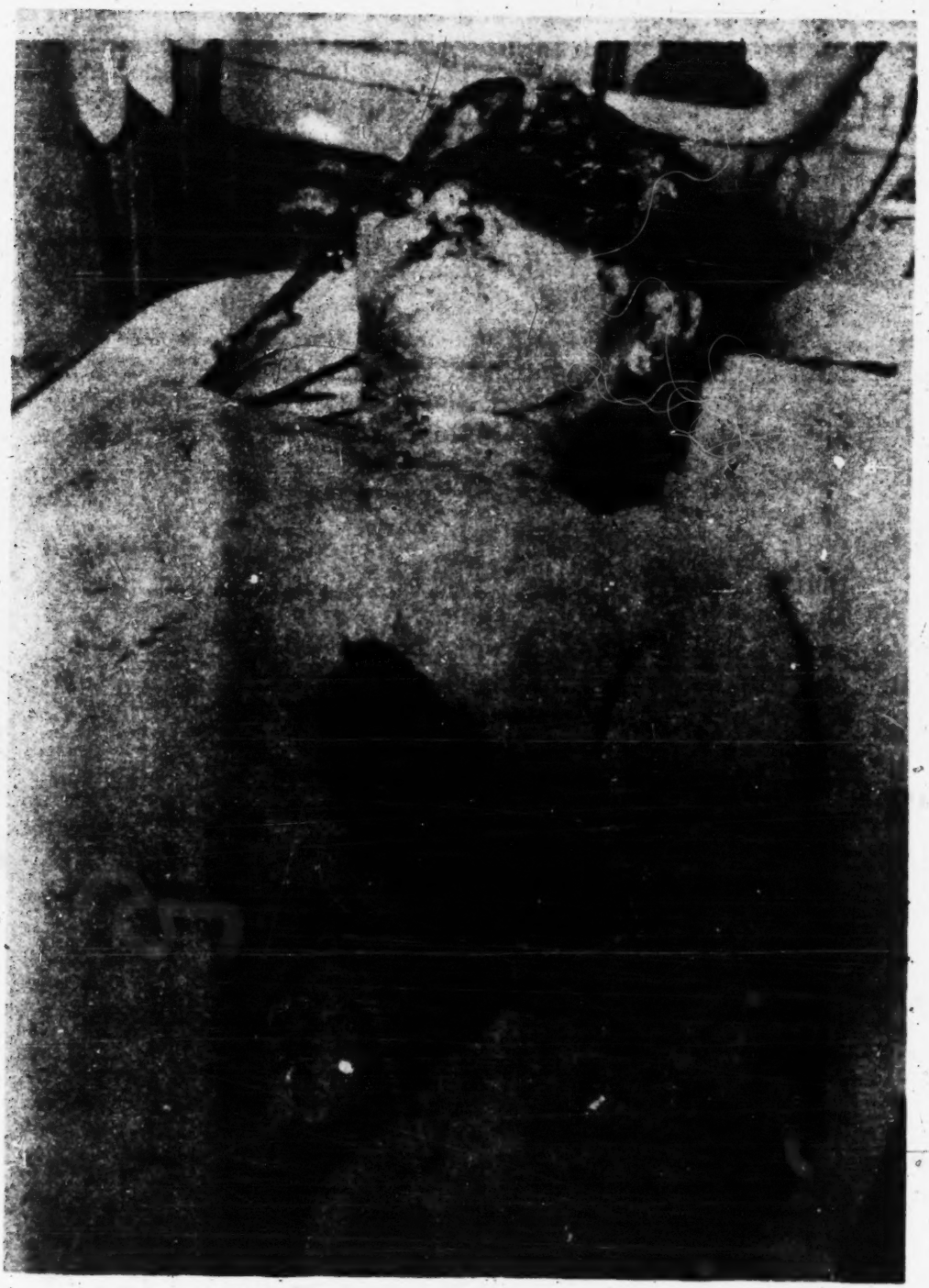
I again examined Mr. Dick's body at the Lozier Funeral Home on January 20th about an hour and a half after I was at the farm. The clothes had been removed from the corpse and we found another wound in the chest.

"A. The wound was a furrow type of wound, just like a gouged out wound on the left lateral chest wall (indicating), and it started right where—we call it about the tenth rib and where you would say the arch of the rib cage is, and it extended from this area up to, in a—from down and out or from the left it extended up and to the right, but it only extended for a matter of about five and a half inches; and the top of the wound was about two and a half to three inches below the left nipple, and the greatest width of the wound was about two and a half inches. This wound took off the skin, it took off the fat, it took off the rib muscles, and it took off portions of the ribs; and that's enough—or do you want more? It penetrated into the body because it knocked off portions of the rib, and they acted as splinters that penetrated into the body, and there was also B-B's that penetrated into the body."

Defendant's Exhibit 17 shows the wound.

[fol. 25]

DEFENDANT'S EXHIBIT 17



[fol. 26] The wound to the head caused his immediate death. That would not be true of the wound in the chest. I think it was a mortal wound but not immediately fatal. It would eventually cause his death within one day to two weeks. The chest wound is terrifically painful. I don't think it would result in his losing consciousness. The chief consequence would be pain. I imagine with collapse of the lung and destruction of considerable pleura, fracture of two, three ribs, that he was in so much pain that it was just unbearable.

"Q. Well, would he have the capacity to fire the trigger of a shotgun after that first, that blow in the side?

A. I think he would."

As coroner I signed a death certificate which was filed with the State Department of Health. Defendant's Exhibit 25 is a correct photo copy of the death certificate bearing my signature as coroner of Ransom County, North Dakota.

"Mr. Tennseon: We offer Defendant's Exhibit 25 in evidence.

Mr. Vogel: The exhibit is objected to on the ground that it is entirely irrelevant and immaterial, that it is hearsay, that it is an effort to allow the witness to testify on a matter that is not the proper subject of expert testimony, and that it invades the province of the jury and is prejudicial, and I assign the asking of the questions of the witness as error.

Mr. Tenneson: If the Court please, I desire to call attention to the North Dakota Statutes, Section 23.0240.

The Court: Official records.

Mr. Tenneson: I might read——

The Court: (interrupting) An official record, isn't it?

Mr. Tenneson: Yes, your Honor, and particularly on death certificates and birth certificates. Perhaps your Honor is familiar with the statute.

The Court: I am familiar with the law.

Mr. Tenneson: The law makes—as it says: 'A registrar's certificate of the record of a birth and a certified copy of any birth or death certificate issued by the state registrar of vital statistics shall be prima facie evidence of [fol. 27] the facts therein stated and shall be accepted as such proof in any court or before any commission, bureau, board, or agency in this state.'

Now, your Honor, of course, is familiar with Rule 44 of the Rules of Civil Procedure which provides expressly that official records are admissible in evidence. If the Court desires, I will be glad to read Rule 44.

The Court: I am familiar with it. I felt this question would come up, gentlemen.

As counsel very well knows, the purpose of a coroner's inquest and the——

Mr. Tenneson: (interrupting) Death certificate.

The Court: It is a result thereof, is it not?

Mr. Tenneson: No, no, your Honor. This is a record which the law requires him to file and which he did file, having been the last doctor who attended the deceased.

The Court: I can't read it anyway. Have you got a glass that will magnify this, Madam Clerk?

The Clerk: No, your Honor. I believe there is one in the Marshal's office.

Mr. Tenneson: I have noted on here the statute and rules, your Honor.

The Court: The objection to Defendant's Exhibit 25 is sustained. Do you wish to make a record of it, Mr. Tenneson?

Mr. Tenneson: Well, I don't know what further record I can make, your Honor.

The Court: Do you wish to make a record of an offer of proof of any kind? If you do, please come to the bench.

Mr. Tenneson: If it isn't necessary—no, I have offered the exhibit, it has been refused.

The Court: It isn't necessary.

(Defendant's Exhibit No. 25, having been previously duly marked for identification, so offered in evidence, was rejected.)"

[fol. 28]

DEFENDANT'S EXHIBIT 25

North Dakota Certificate of Death
State Department of Health

Registrar's No. 628

1. Place of death—Alleghany Twp., Ransom County. Length of stay (in this place) 47 yrs.

2. Usual residence—Alleghany Twp., Ransom County, North Dakota.

3. Name of deceased—William Henry Dick.

4. Date of death—Jan. 20, 1955.

5. Sex—Male.

6. Color—White.

7. Married.

8. Date of birth—Nov. 1, 1907.

9. Age—47 years, 2 months, 19 days.

10a. Usual occupation—Farmer.

10b. Kind of business—Farming.

11. Birthplace—Englevale, North Dakota.

12. Citizen of what country—U. S.

13. Father's name— Philip Dick,

13a. Mother's maiden name—Mary Strok.

14. Spouse's name—Blanche McDaniel.

15. Was deceased ever in armed forces?—No.

16. Social security number—None.

17. Informant's signature—Mrs. Lester McClond, Elliot North Dakota.

18. Cause of death—Self-inflicted gun shot wounds. 1. of left chest wall 2. of frontal area of head.

20. Autopsy—Yes.

21a. Suicide.

21b. Place of injury or accident—Barn of farm.

[fol. 29] 21c. City, town, or township—Alleghany Twp., Ransom, North Dakota.

21d. Time of injury—Jan. 20, 1955, 9 m.

21f. How injury occured?(sic)—Not known.

22. I hereby certify that I attended the deceased from Nov 10, 1954, to Jan. 20, 1955, that I last saw the deceased alive on Jan. 2, 1955, and that death occurred at 9 a.m. from the causes and on the date stated above.

23a. Signature—A. Veitch, M. D., Coroner.

23b. Address—Ransom County, Lisbon, North Dakota.

23c. Dated—1/29/55.

24a. Burial.

24b. Date—Jan. 24, 1955.

24c. Name of cemetery—Oakwood.

24d. Location—Lisbon, North Dakota.

25. Funeral director—R. Van Lozier, Lisbon, N. D.

Date received by local reg.—Jan. 31, 1955.

Registrar's signature—Evelyn Brekke, Deputy.

State of North Dakota

ss.

County of Burleigh

I, Russell O. Saxvik, M. D., state health officer and state registrar, do hereby certify that the foregoing is a true and correct photocopy of the original record of death filed, kept and preserved in the office of the Division of Vital Statistics, State Department of Health, Bismarck, North Dakota.

Dated March 2, 1955.

Russell O. Saxvik,
State Health Officer and State Registrar

Elna H. Kavonius,
Division of Vital Statistics.

Offered—Objection sustained.

[fol. 30] As a physician I attended Mr. Dick in 1954 prior to his death. I first saw him on September 13th. He had a form of mild to moderate non-specific prostatitis. "Non-specific" means no organism, no venereal, no definite organism was causing these complaints. He said he was tired and kind of felt pepless. I next saw him September 28th, when he came back for another treatment saying these treatments helped him. The next visit was October 1st. He was on some sulfa therapy. It was on the first or the 8th when he came back and wanted another treatment and some more sulfa. I was giving him medicine or hormone by injection in the office each time after the first visit. I saw him on the 8th and the 16th of October, giving him the same treatments. I saw him again on November 20th and 27th because it was colder weather and he had partial return of his symptoms which was ache and pain. The last time I saw him was on December 30, 1954. He was in a very fine state of mind and wished me a happy New Year and other seasonal greetings. I saw him eight times in all.

In connection with the claim by Mrs. Dick against the defendant I completed some proofs of death. I handed them to Mr. Hanna, the company's agent. Defendant's Exhibit 9 bears my signature at the bottom.

When I examined Mr. Dick's body at the funeral parlor I observed definite powder marks on the skin of the left forehead in front of the ear. They extended a half inch to an inch, quite a high concentration of a powder burn. There were no powder burns that I could definitely say were powder burns on the skin of the left chest wall.

There might be blood stains on the inside of the jacket, Defendant's Exhibit No. 18, near the lower hole. I can't be positive without a chemical examination as to the other garments.

Cross examination.

I have known Mr. Hanna, agent for the defendant, since October or November 1945.

There were no blood stains on the cap. I made no actual measurements of the screwdriver.

[fol. 31] A gouged or furrowed type wound as I called it is made by many instruments blasting out everything that was in front of it. The wound was made before death.

"Q. Isn't it likely under those circumstances that the man would lose consciousness from any injury of that kind?

A. Not necessarily.

Q. But it is possible that he would lose consciousness?

A. No, I wouldn't even say it was possible that he would lose——

Q. (interrupting) And you testified that his lung was actually collapsed from the shot?

A. Yes. That happens many times.

Q. And the pain that the man would have from that would be of a tremendous nature?

A. Very, very severe."

Mr. Dick was a medium sized man in his middle forties, muscular, hard working, mature, but not senile or pre-senile. He was a mature, muscular, physically able workman. He had very good strength. He could do any farm work that was necessary. During the times I saw him his illness wouldn't prevent him from doing his work. He would do his work every day in spite of the misery he was having. He wasn't hospitalized. When I saw him last on December 30th he was bright and cheerful. We exchanged seasonal greetings. That was an especially cold, windy, stormy day; and probably a little more twinges, rheumatism and backache and prostatitis is probably the reason he came in for the treatment that day. He paid me $5.00 for each of the eight treatments. I was satisfied with Mr. Dick's progress.

The brain matter I saw was generally in the southeastern corner of the shed in the region of the door. There was silage on the floor. I don't think there was any on the steps of the shed. January 20th was kind of a cold, blustery day. There had been snow blusters on the way out. The temperature would probably be above zero, around probably ten above. The dead man was wearing gloves.

I do life insurance examination work for the defendant and have for many years.

[fol. 32] ARNOLD ROOKS:

Direct examination.

I have been a member of the Fargo Police Department for ten years. Among my other duties I am in charge of the so-called arsenal of rifles and shotguns, keeping them clean, test firing them to see they are working right. I am range master for the police target range. I have had special training on firearms. I have instructed on firearms in connection with in-service training.

A shotgun charge, because it is made up of pellets, tends to spread immediately upon leaving the muzzle of a gun. It is possible to determine the direction from which a bullet is fired by an examination of the holes that it would leave in the object struck. On arrival it would leave a small hole. If it was a hollow point bullet and exploded it would make a larger hole on exit. The same would be true of a shotgun charge.

When fired at close range the burning powders and gases leave marks called powder burns. Such burns would occur if the gun was fired at close range to the object.

After examining Defendant's Exhibit 18, the jacket worn by Mr. Dick, the direction of the shot charge according to the holes present is from front to rear. It is smaller in front of the jacket. I see what looks like powder marks on the fabric of the jacket at the holes toward the front. I see none at the hole to the rear. The powder burn shows a little darker around the smaller hole in front. It is about an inch on each side of the top and bottom of the hole.

Cross examination.

The police department has three shotguns.

The shot pattern of a shotgun would increase maybe four inches in three feet. In a distance of three inches it would expand maybe a quarter of an inch larger than the actual size of the barrel on a 12-gauge.

[fol. 33] On powder burns some of the powder is still burning as it is going out the barrel and it doesn't completely burn before it leaves the barrel.

I do not know whether there are more or less than 150 pellets in a No. 6 twelve gauge shell.

FRED HANNA:

Direct examination.

I am life insurance agent for the defendant at Lisbon, North Dakota, and have been continuously for 14 years. I sold the two policies of insurance which are the subject of this action to Mr. Dick. I gave notice of his death to the Fargo office in writing. Defendant's Exhibit 26 is the notice which is in my handwriting. Later I received from the Fargo office the proofs of death forms, which are Defendant's Exhibits 8 and 9. I took Defendant's Exhibit 8 to the Dick farm, asked Mrs. Dick the questions and wrote them down as she answered them. Exhibit 8 was signed by Mrs. Dick on January 27, 1955. I took Defendant's Exhibit 9 to Dr. Veitch and asked him to complete it, which he did and returned it to me. He signed this exhibit on January 31, 1955. I then mailed both exhibits to the Fargo office.

Cross examination.

"Mr. Vogel: In so far as Defendant's Exhibit 8 is concerned, that is dated on January 27, 1955, is it not?

The Witness: That's correct, sir.

Mr. Vogel: With respect to Defendant's Exhibit 9, that was never exhibited to Mrs. Dick, was it?

The Witness: No, sir.

Mr. Vogel: You went out to her farm home, and you obtained Defendant's Exhibit 8 on the 27th of January, and then you obtained Defendant's Exhibit 9 on the 31st day of January?

The Witness: That's right, sir.

[fol. 34] Mr. Vogel: So that Mrs. Dick has never seen Defendant's Exhibit 9?

The Witness: I don't believe so, not to my knowledge."

DONALD C. HOLAND:

Direct examination.

I am an attorney and have been engaged in the practice of law at Lisbon for eight years. I have acted as Mrs. Dick's attorney since the first part of March, 1955, to assist her in securing payment of the benefits provided for under the policies. I had correspondence with the defendant company for the purpose of convincing them that Mr. Dick's death was accidental. Defendant's Exhibit 27 are true and correct copies of correspondence which I had with the defendant regarding the claim for accidental death benefits.

Testimony For Plaintiff In Rebuttal

LAWRENCE DICK:

Direct examination.

I am a brother of William Dick, a farmer, and live in Richland County.

I am familiar with the silo shed on my brother's farm. The east door leading into the barn was hung so that if it was open about halfway it would close by itself. There was no spring on the door.

Last night I cut open a 12-gauge shotgun shell with No. 6 shot and counted the number of pellets in a high brass shell. I counted 275 pellets in one shotgun shell.

My brother, William, and I have gone hunting together many times. The last time was two years ago yesterday (November 8, 1954). He used the double-barreled shotgun that is in evidence.

"Q. While you and your brother were hunting together, do you know whether or not he ever at any time had an accidental discharge of that gun?

[fol. 35]

DEFENDANT'S EXHIBIT 9

PROOFS OF DEATH—PHYSICIAN'S STATEMENT

Printed in U.S.A.

Submitted to

NEW YORK LIFE INSURANCE COMPANY
51 Madison Avenue, New York 10, N. Y.

NOTE: The Medical certification follows the recommendations of the World Health Assembly made in Geneva on July 24, 1948. It has been accepted by all States in this country and in Canada.

In the interest of accurate vital statistics, please conform to the International List of the Causes of Death.

Full name of deceased. William Dick	Date of death Jan 20, 1955
Residence at death Allegany Twp Potter Co Coudersport Pa	Place of death Wm Dick farm England
Age at death or date of birth 47	(If Hospital or Institution, give name)

1	Cause of death (*Enter only one cause for each of a, b, and c.*) Disease or condition directly leading to death: *(This does not mean the mode of dying, such as heart failure, asthenia, etc. It means the disease, injury or complication which caused death.)* (a) Death from self inflicted shot gun wounds 1. left chest 2. Frontal area of head Antecedent causes. *(Morbid conditions, if any, giving rise to the above cause (a) stating the underlying cause last.)* Due to (b)	Interval between onset and death (a) (b)

[fol. 36] Mr. Tenneson: Just a moment, please. We object to that question if the Court please, on the ground that it is too remote in time; there is no foundation laid showing that the gun was in the same condition two years ago as it was on the date of Mr. Dick's death; entirely conjectural and speculative and of no probative value to the jury.

The Court: The objection is overruled. You may answer.

A. Yes. We were hunting pheasants close to Bismarck, and we were walking about a block apart in rushes and weeds——

Mr. Tenneson: (interrupting) If the Court please——

Mr. Vogel: (interrupting) Let the witness finish his statement.

Mr. Tenneson: I have a right to object, your Honor.

The Court: I think that's true, you do. Just tell us the particular circumstances without going into any preliminaries, Mr. Dick.

The Witness: Well, we walked about three blocks and I heard a shot, but I didn't see any birds, and I hollered at him and he told me that his gun had discharged and he said it would do that once in a great while."

Cross examination.

I don't know whether any repairs were made to my brother's gun after this incident I testified to. They could have been made. It is entirely possible that instead of discharging without his knowledge he may have pulled the trigger. He might have thought he had the gun on safe when he didn't, or he may have pulled the trigger and not be aware of it.

MOTION OF DEFENDANT TO STRIKE TESTIMONY AND OVERRULING THEREOF.

"Plaintiff and defendant rest.

The Court: All right, gentlemen, are you ready to proceed?

[fol. 37] Mr. Tenneson: If the Court please, we have some motions we would like to make and I assume they should be made out of the jury's hearing.

The Court: I will ask the jury to kindly remain in the box, and I will ask counsel to accompany me in chambers for a few minutes.

(Whereupon, the following proceedings were had in chambers out of the presence and hearing of the jury:)

The Court: Ready, gentlemen?

Mr. Tenneson: At this time the defendant moves the Court to strike out all the evidence with reference to the sheep and wild dogs on the ground that the evidence is too remote in time to have any probative value in the case and could only tend to mislead the jury if it went to the jury.

You will recall that counsel stated when he first went into that question, he said that he would connect it up. It is our view that he has not connected it up, and we, therefore, move to strike.

Mr. Vogel: Your Honor, the motion is, of course, resisted. I think that the evidence plainly shows that for several months prior to the accident and within one year prior to the accident there were vicious dogs around the property and that between 20 and 30 of the sheep owned by Mr. Dick were mutilated and killed. It would be a foolish farmer, indeed, who, if that had happened to his flock, would do nothing to protect them even if the accident to the sheep had happened a year before the actual time of the death of this man. I think that the evidence has very strong probative value, and it indicates to the jury what this man may very well have been doing at the time of his death. He is not here to testify himself and under the circumstances he is entitled to the benefit of all of the circumstances that are built up around the farm.

Mr. Tenneson: If the Court please, I desire further to point out that the best the witness, George Dick, could do was to place this incident about one year prior to the death.

The Court: The motion is overruled."

[fol. 38] MOTION OF DEFENDANT FOR INSTRUCTED VERDICT AND OVERRULING THEREOF

"Mr. Tenneson: Both parties having rested, the defendant at this time requests the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff for a dismissal of this action. Said motion is made upon the grounds that there is not sufficient evidence in the case that the death of William Dick resulted by accidental means as defined and set forth in the policy.

On the contrary, the evidence conclusively shows from the physical facts and from the exhibits offered and received in evidence that his death was attributable to self-destruction or suicide.

Further, upon the ground, if any doubt at all existed it has been resolved by the testimony to the effect that not one shot but two shots from the gun were fired. It is conceivable that ones shot might have been accidental, it is inconceivable that two shots could have been the result of an accident.

Mr. Vogel: The motion is resisted, your Honor.

The Court: The motion is overruled."

DEFENDANT'S REQUESTED INSTRUCTION No. 2

You are instructed that the double indemnity benefit is payable only if the death of William Dick, the insured, resulted from accidental means. Under the terms of the policies of insurance the accidental means death benefit is payable only if you find from the evidence that the death of the insured, William Dick, resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means, provided, however that such double indemnity is not payable if the insured's death resulted from suicide, whether sane or insane. It is not disputed in this case that the death of the insured resulted from external and violent means, but it is disputed as to whether the death was accidental. I instruct you that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the

[fol. 39] death of William Dick resulted solely from accidental means as limited and defined in the policies of insurance, and this burden of proof continues with the plaintiff throughout the trial. If you are satisfied by a fair preponderance of the evidence that the death was accidental, your verdict should be for the plaintiff for the full amount of her claim which is $7,500.00. If on the contrary you are satisfied by the same measure of proof that the death was suicidal, you should find a verdict for the defendant. If you are unable to determine upon the evidence whether the death was accidental or suicidal, the plaintiff will have failed to meet the burden of proof as to accidental death, and your verdict must be for the defendant for a dismissal of the action.

Jefferson Standard Life Insurance Company v. Clemmer (C. C. A. 4th, 1935), 79 F. 2d 724, 103 A. L. R. 171 and note p. 185.

New York Life Insurance Company v. Gamer, 303 U. S. 161, 82 Law Ed. 726.

Headlee v. New York Life Insurance Company (S. D. 1943), 12 N. W. 2d 313.

Annotation: 158 A. L. R. 748.

COURT'S INSTRUCTIONS TO JURY

The Court: Members of the jury, counsel for both parties to this lawsuit have carefully and ably presented this case and outlined their respective positions in their arguments to you today.

It now becomes my duty to instruct you in the law that applies in this case, and it becomes your duty as jurors to follow the law as I shall give it to you. On the other hand, it is your exclusive province to determine the facts in this case and to consider and to weigh the evidence for that purpose.

During the trial the Court has been called upon to pass on the question of whether or not certain offered evidence

might properly be admitted. You will not concern yourselves with the reasons for such rulings, and you will not draw any inferences therefrom. Whether offered evidence is admissible is simply a question of law for the Court. In [fol. 40] admitting evidence to which an objection has been made, the Court does not determine what weight should be given such evidence nor does it pass upon the credibility of the witness.

As to any offer of evidence that may have been rejected by the Court you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection; nor may you draw any inference from the question itself.

I charge you that you must weigh and consider this case without regard to sympathy or prejudice for or against either party to the action.

The plaintiff herein, Blanche Dick, is suing the New York Life Insurance Company for $7,500.00, this being the amount of double indemnity benefits provided for in the two policies of insurance, the face value of which has already been paid.

The defendant insurance company concedes that the policies were issued; that the insured, William Dick, is dead; and that he died by means of external violence; but has pleaded as a defense that William Dick died by suicide or self-destruction.

There is but one single issue for you to determine, and that is the manner of death. If you are satisfied by a fair preponderance of the evidence that the death was accidental, your verdict should be for Blanche Dick for the full amount of her claim of $7,500.00. If, on the contrary, you are satisfied by a fair preponderance of the evidence that the death was suicidal, your verdict should be for the defendant.

I charge you that Blanche Dick has the burden on herself of showing the contract under the policies and the death of the deceased. That much has been shown and, as a matter of fact, has been admitted by the defendant company. The case of the plaintiff would be made out by that showing and admission, but for the denials in the defense

set up by the defendant that William Dick took his own life.

The defendant company, admitting the death and admitting the obligation under the contract, sets up as a spe-
[fol. 41] cial and affirmative defense that the contracts, so far as double indemnity is concerned, are not enforceable in this state because William Dick committed suicide.

Under the terms of the two policies here in question this defense is good, if sustained by the proof. On that defense the defendant insurance company has the burden of proof. The defendant is required to make out its case on that defense by a fair preponderance of proof; that is, to make you, by its proof or the proof in the case, believe that its defense has been established with a reasonable degree of certainty.

I charge you that it is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed.

I charge you that presumption is not evidence, and if you believe from the evidence that there is such a fair preponderance of truth as will satisfy you to a reasonable certainty that William Dick took his own life, such presumption is overcome and you must find for the defendant.

You are instructed that when the Court uses the term "burden of proof," the Court means that the party who has the burden of proof must prove her or its claim by a fair preponderance of the evidence.

You are further instructed that the term "fair preponderance of the evidence" means the greater weight of the evidence. This is not determined solely by the greater number of witnesses testifying in regard to any particular fact. It means that the testimony on the part of the party on whom the burden of proof rests must have a greater weight and, in your opinion, a more convincing effect than the testimony opposed to it. If, in your opinion, the testimony on any essential point is evenly balanced, then the party upon whom the burden of proof rests must be deemed to have failed in that regard.

I charge you that evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly without any inference or presumption and

which, in itself, if true, conclusively establishes the fact. [fol. 42] Indirect evidence is also known as circumstantial evidence. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or presumption of its existence.

Both direct evidence and circumstantial evidence are recognized and admitted in courts of justice; and upon either or both juries lawfully may base their findings. The law makes no distinction between the two classes as to the degree of proof required but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

I charge you not to consider as evidence any statement of counsel made during the trial unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected or any evidence that was stricken out by the Court; such matter is to be treated as though you never had known of it.

You must never assume or speculate to be true any insinuation carried or suggested by a question put to a witness by examining counsel or even by the Court. The examiner's question is not evidence except only as it explains or throws light upon the answer.

I charge you to decide this case solely upon the evidence that has been received by the Court and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom as noted in these instructions and in accordance with the law as I state it to you.

I charge you that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner of the witness on the stand, the degree of intelligence exhibited by him and the manner in which he testified; by the character of this testimony; by evidence showing his motives or an interest in the outcome of the case, or bias or prejudice against one of the parties.

[fol. 43] Discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innosent misrecollection is not uncommon. It is a fact also that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered by you in weighing its significance.

In weighing the testimony of witnesses it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring or an inclination to favor any party? Was he, in other words, a biased or an impartial witness? What degree of intelligence, what quality of memory, so far as concerns this case, were revealed by his appearance, manner of testifying and all other evidence in the case? Was the testimony reasonable and consistent within itself and with uncontradicted facts?

Should you consider any of these questions, either in your own private reasoning or in open discussion, you must look for an answer only to the witnesses who testified and to the evidence admitted in the trial of this action.

I charge you that the jury is not permitted to base its verdict upon speculation or conjecture, or to guess how this death may have occurred. Your verdict must be based upon the evidence introduced in the case.

In the course of the trial of this case there has been reference made to testimony given at a coroner's inquest. Under our law a county coroner may hold an inquest under certain circumstances.

The trial of a civil action for damages is for an entirely different purpose. The record of testimony taken at a coroner's inquest as such is not admissible as evidence in the [fol. 44] trial of a civil action since, as the Court has in-

dicated, the purpose of a civil action is for other and different reasons.

Where one is actually called to testify in a civil action, his testimony taken at a coroner's inquest may be used to refresh his recollection or to show a variance, if any, in his testimony at the trial and the coroner's inquest.

Whether there is any material variance in the testimony of a witness, or whether such variance is of serious import, is for you to determine.

I charge you that the rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if in your judgment the reasons given for it are unsound.

I charge you that if you find as a fact that William Dick was careless and negligent in the handling of the shotgun at the time of his death, that fact itself would not prevent plaintiff from recovering in this case since, while under North Dakota law, an insurer is not liable for a loss caused by the wilful act of the insured, by the same token the insurer is not exonerated from liability by the negligence of the insured.

To recapitulate, I charge you that if you find from a preponderance of the evidence that the death of William Dick was not due to suicide but resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, then your verdict should be for Mrs. Dick and against the New York Life Insurance Company; but that if you find from a preponderance of the evidence that the death of William Dick was a suicide, your verdict should be for the defendant New York Life Insurance Company.

[fol. 45] The Court has admitted into evidence certain exhibits consisting of a shotgun, clothing, correspondence and certain related exhibits. All of these exhibits you may take with you into the jury room, and I charge you to give to those exhibits just such consideration as you think they may be entitled, no more and no less.

As the Court has heretofore indicated, you are the sole and exclusive judges of the facts. You will determine the facts from the evidence you have heard during this trial. If your recollection of the testimony is different or contrary to the recollection of counsel as given to you in their arguments, you will disregard the opinions of counsel and rely solely upon your own recollection. If any opinion has been expressed by counsel as to the facts in this case that is at variance with your own opinions, you should follow your own opinions and not that of counsel for either side.

I have had prepared and will send with you to your jury room two blank forms of verdict.

Form of Verdict No. 1 reads: "We, the jury, duly empaneled and sworn to try the above-entitled case, find in favor of the plaintiff, Blanche Dick, and against the defendant, New York Life Insurance Company, a corporation, in the sum of $7,500.00." If your verdict is for Blanche Dick, you will fill in form of Verdict No. 1, your foreman will sign it and you will return it into open court.

Form of Verdict No. 2 reads: "We, the jury, duly empaneled and sworn to try the above-entitled case, find in favor of the defendant, New York Life Insurance Company, a corporation, and against the plaintiff, Blanche Dick, for dismissal of the action." If your verdict is for New York Life Insurance Company, your foreman will sign form of Verdict No. 2, and you will return it into open court.

* * * * * * *

The Court: Now, members of the jury, counsel on either side are permitted, if they choose, to make such objections as they may wish to the Court's charge, and for that purpose we will retire into chambers and I shall ask you to remain in the jury box and we will return shortly.

[fol. 46] (Whereupon, the following proceedings were had in chambers without the presence and hearing of the jury:)

The Court: All requested instructions except as given in the general charge are specifically denied.

* * * * * * *

The Court: Normally, you would be first, Mr. Vogel, as plaintiff.

Mr. Vogel: Norman has the instructions so maybe you better go ahead.

Mr. Tenneson: Well, the defendant objects and excepts to the failure of the Court to give its requested Instruction No. 2 relating to the burden of proof. I think the modern rule and the best rule is that when credible evidence has been introduced negativing the claim of accidental death, as we believe has been done in this case, that the jury should not be instructed one way or the other with regard to any presumption against suicide.

The Court: The exception will be noted.

Mr. Tenneson: We further except to the sentence in the Court's instruction stating that "I charge you that it is manifest that self-destruction cannot be presumed."

Now, your Honor please, that is giving the presumption the weight of affirmative evidence. If, as we believe, the showing made by the defendant is sufficient to sustain a verdict based upon suicide, the presumption should not be mentioned to the jury in the instructions at all.

The Court: The exception is noted.

The Clerk: Which instruction was that last sentence from?

The Court: The instructions are not numbered, Mrs. Holt. Get it from the reporter. We didn't have time to number them today. We usually do.

Mr. Tenneson: We further object to the Court's instruction reading as follows——

The Court: (interrupting) Pardon me. What page?

Mr. Tenneson: On page 7, quoting from the instructions: [fol. 47] "The trial of a civil action for damages is for an entirely different purpose. The record of testimony taken at a coroner's inquest as such is not admissible as evidence in the trial of a civil action since, as the Court

has indicated, the purpose of a civil action is for other and different reasons."

We object to this instruction on the ground that, if followed by the jury, it would completely rule out any testimony from the exhibits which we introduced showing the correspondence between the defendant insurance company and Mr. Holand, the plaintiff's attorney.

The Court: That went in by stipulation, did it not?

Mr. Tenneson: Yes, but the point is that your instructions, as I understand them, state that it is not admissible as evidence in the trial.

The Court: As such.

Mr. Tenneson: But it actually has been admitted, not the actual inquest itself, but testimony from the correspondence and letters regarding the inquest. I think it is apt to mislead the jury, and they might well conclude that they cannot give any weight to the references to the coroner's inquest so far as they are contained in this correspondence.

The Court: Well, Mr. Tenneson, if you will read farther down on page eight, you will note that the jury are instructed: "Whether there is any material variance in the testimony of a witness, or whether such variance is of serious import, is for you to determine."

Mr. Tenneson: The testimony was not offered for the purpose of any variance. It was offered for its intrinsic worth.

The Court: It must be offered to show at least a variance. There were times when the witness was asked specific questions and specific answers given from the inquest record.

Mr. Tenneson: Well, I don't think that any time did we use the testimony at the inquest for impeachment purposes. Mr. Vogel did in examining at least one of the witnesses.

[fol. 48] The Court: Well, the rule would apply equally to either party.

All right. That exception is also noted.

Mr. Tenneson: I think that's all, your Honor.

The Court: Mr. Tenneson, did I understand you to say

that you do not believe the presumption against self-destruction is the modern rule?

Mr. Tenneson: I think once evidence has been introduced from which the jury can conclude that the cause of death was suicide, that the presumption falls out of the case. It has served its office. It operates in the absence of evidence.

The Court: But in that same instruction I have so charged that presumption is overcome. I told them that presumption was not evidence; that if they believed from the evidence that there was such a fair preponderance of truth as will satisfy them that Mr. Dick took his own life, that the presumption is overcome, and they must find for the defendant. I told them in that same charge.

* * * * * * *

The Court: The exception will be noted.
Mr. Vogel: We have no other exceptions.
The Court: All right, I guess that's it.

(Whereupon, at 4:28 o'clock p.m., the proceedings in chambers without the presence and hearing of the jury were completed; and the Court and counsel returned to the court room.)

IN UNITED STATES DISTRICT COURT

ORDER—Filed November 18, 1955

The above-entitled action coming on for hearing before the Court upon the stipulation and agreement between the parties thereto dated November 14, 1955, and the Court having examined said agreement and being fully advised in the premises, approves and confirms the same, now therefore, in accordance therewith it is hereby

[fol. 49] Ordered, that upon the payment by the defendant to the plaintiff of the sum of $7,687.73 and the filing in this Court of the receipt of the plaintiff therefor, the defendant shall be and is hereby fully released and discharged of and from any and all liability to the plaintiff, Blanche Dick, for the single indemnity benefits payable

under said policies of insurance upon which this action is brought, being the face amount thereof plus certain additions thereto, and it is further

Ordered, that upon the trial of this action, the only issue remaining for determination shall be the right of the plaintiff to recover from the defendant the double indemnity benefits provided for in said policies of insurance.

Dated this 18th day of November, 1955.

Ronald N. Davies, Judge, United States District Court.

In United States District Court

Verdict—Filed November 10, 1956

We, the jury, duly empaneled and sworn to try the above-entitled case find in favor of the plaintiff, Blanche Dick, and against the defendant, New York Life Insurance Company, a corporation, in the sum of $7,500.00.

Dated at Fargo, North Dakota, this 10th day of November, A. D. 1956.

Don L. Tracy, Foreman.

In United States District Court

Judgment—Filed November 10, 1956

Pursuant to the verdict of the jury rendered and returned in the above-entitled action on November 10, A. D. 1956, it is hereby

Ordered, adjudged and decreed that the plaintiff, Blanche Dick, have judgment against the defendant, New York Life Insurance Company, a corporation, for the sum [fol. 50] of Seven Thousand Five Hundred Dollars ($7,500.00); and it is further

Ordered, adjudged and decreed that the plaintiff have judgment against the defendant for the sum of Two Hun-

Due to (b) (b)

Due to (c) (c)

Other significant conditions: *(Contributing to the death but not related to the disease or condition causing death.)*

2	Date of First Attendance in Last Illness	Date of Last Attendance in Last Illness
3	If death was due to accident, suicide or homicide, specify which. Describe briefly. Suicide	Was an inquest held? ☑ Yes ☐ No Was an autopsy performed? ☑ Yes ☐ No If so, by whom and with what findings? Dr A Vaitek Coroner Ransom Co Lucerne Kan

4 Have you treated or advised the deceased during the last 3 years, prior to last illness? ☑ Yes ☐ No

Did the deceased, to your knowledge, receive treatment during the last 3 years from any other physician, or in any Hospital or Institution? ☐ Yes ☑ No

If Yes to either question, please furnish the following:

Name	Address	Nature of Illness or Injury	Dates
Dr A Vaitek	Lucerne	Tired & fatigued	Oct to Jan 1954 1955

A Vaitek MD
Signature M. D.

Jan 31 1955 Lucerne Kan
Date Address

(The reverse side may be used for any additional information or remarks)

dred Eleven and 35/100 Dollars ($211.35), her costs and disbursements herein, to be hereafter taxed and allowed by the Clerk, and interest to November 10, 1956, in the sum of $533.33.

Dated this 10th day of November, A. D. 1956.

Ronald N. Davies, Judge, United States District Court.

IN UNITED STATES DISTRICT COURT

MOTION TO SET ASIDE VERDICT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL—Filed November 20, 1956

Defendant moves the Court to set aside the verdict entered in the above-entitled action on November 10, 1956, and to enter judgment in accordance with its motion for directed verdict on the ground that the motion for directed verdict should have been granted because:

1. The evidence in the case clearly establishes that William Dick was an experienced hunter, thoroughly familiar with shotguns and their operation, and was careful in the handling of firearms; that his gun was dry and in good operating condition and after being loaded could not be discharged without first moving the safety catch from safe position; that it could not be discharged without exerting 6 to 7 pounds pressure on each trigger; that the silo steps were dry and free from ice; all of which facts clearly establish that the gun was discharged by the voluntary and deliberate act of the insured; that there was therefore no credible evidence from which the jury could find that death resulted directly, and independently of all other causes, from accidental means, but that the verdict was necessarily based upon surmise, conjecture, speculation and sympathy for plaintiff.

2. Under the undisputed evidence two shots were fired from the gun with the shot patterns in opposite ends of the [fol. 51] silo shed and at different elevations, all of which in and of itself clearly rules out any possibility that the

second shot could have been accidentally caused, it clearly appearing from the evidence and the physical facts that the insured was then conscious and possessed the ability to discharge the second trigger.

3. That the presence of powder burns only on the front of the outer jacket and the forehead of the deceased, which evidence was undisputed, clearly established that both shots were fired deliberately from close range and conclusively negatives any claim of accidental discharge.

4. That the proofs of death submitted by the attending physician as a part of plaintiff's proof of claim to the defendant, the illness of the decedent not fully disclosed to his wife, his moody disposition at times and his impulsive actions, together with the undisputed evidence after tests that the shotgun was in good working condition immediately following his death and could not be fired without the intervention of a human agency, all clearly established that the cause of death was necessarily suicide.

In the alternative, defendant moves the Court to set aside the verdict and the judgment entered thereon, and grant defendant a new trial on the following grounds:

1. The verdict was contrary to law and the evidence.

2. The evidence was insufficient to justify the verdict in that there is no evidence to show that the death of William Dick was caused by accidental means as defined in the policies of insurance.

3. The Court erred in overruling defendant's objection to the admission of testimony regarding the accidental discharge of the gun two years prior to the trial of the case, and in allowing said evidence to be introduced as part of the plaintiff's case upon rebuttal.

4. The Court erred in overruling defendant's objection to testimony by the plaintiff and James Dick regarding the alleged presence of wild dogs who had killed or mutilated sheep belonging to the insured, and in denying defendant's motion made at the close of the case to strike such evidence from the case.

[fol. 52] 5. The Court erred in sustaining plaintiff's objection to Defendant's Exhibit No. 25 (certified copy of Death Certificate) and refusing to admit the same in evidence.

6. The Court erred in refusing to give defendant's requested instruction No. 2, regarding the burden of proof and in charging the jury that self-destruction cannot be presumed, which in effect told the jury that there is a presumption against suicide and gave the presumption the weight of affirmative evidence. The Court further erred in instructing the jury it was for them to determine whether or not the presumption had been overcome by evidence.

7. The Court erred in its instructions to the jury regarding the effect and weight to be given to Defendant's Exhibit No. 27 (correspondence between plaintiff's attorney and defendant), the effect of the Court's instructions being to completely bar the jury from giving any weight or consideration to such correspondence and the admissions therein contained, thereby misleading the jury and destroying any intrinsic worth which such evidence would have.

This motion is based upon the records and proceedings in this action.

Dated this 19th day of November, 1956.

Norman G. Tenneson, A member of the firm of Cupler, Tenneson & Serkland, 63½ Broadway, Fargo, North Dakota, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER—Filed December 27, 1956

The above-entitled matter came before the Court, the Honorable Ronald N. Davies, Judge, at Fargo, North Dakota, on the 27th day of December, 1956, upon the motion of the above-named defendant to set aside the verdict, or, in the alternative, for a new trial; Mr. Norman G. Tenneson, of the firm of Cupler, Tenneson & Serkland, of Fargo, North Dakota, appearing as attorney for the de-

[fol. 53] fendant in support of said motion, and Mr. Donald C. Holand, of Lisbon, North Dakota, and Mr. Philip B. Vogel, of the firm of Wattam, Vogel, Vogel, Bright & Peterson, of Fargo, North Dakota, appearing for the plaintiff in opposition thereto; and the Court having heard the arguments of counsel, and being fully advised in the premises; now, therefore, it is

Ordered that the motion of the above-named defendant be, and the same hereby is in all things, denied.

Dated this 27th day of December, A. D. 1956.

Ronald N. Davies, Judge, United States District Court.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 22, 1957

Notice is hereby given that New York Life Insurance Company, a corporation, defendant above-named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on November 10, 1956, and from the order entered in said action on December 27th, 1956, denying the motion of said defendant to set aside the verdict and to enter judgment in accordance with its motion for a directed verdict, or, in the alternative, that defendant be granted a new trial.

Dated this 21st day of January, 1957.

Norman G. Tenneson, A member of the firm of Cupler, Tenneson & Serkland, 63½ Broadway, Fargo, North Dakota, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

[fol. 54]

CLERK'S STATEMENT OF PERTINENT DOCKET ENTRIES

Nov. 4, 1955—Filed Petition for Removal.

Filed Bond for Removal.

Filed copy of Summons.

Filed copy of Complaint.

9—Filed Answer.

12—Filed Notice of Removal with Admission of Service.

Filed Certificate of Clerk of Ransom Co. District Court.

18—Filed Stipulation and Agreement re payment of single indemnity.

Filed and entered Order pursuant to Stipulation re single indemnity payment, and if paid the only issue for trial to be right to recover for double indemnity.

25—Filed Receipt to defendant New York Life Ins. Co. from Blanche Dick for single indemnity benefits.

28—Filed Demand for Jury Trial by attorneys for plaintiff with admission of service thereon.

Nov. 7, 1956—Record of trial—Entered order to draw jury—jury duly empaneled and sworn.

8—Record of trial.

9—Record of trial—motion for directed verdict by defendant is denied.

10—Record of trial—jury reports and returns a verdict for plaintiff for $7,500.00, which is ordered received.

Filed Verdict for Plaintiff $7,500.00.

Entered Verdict for Plaintiff for $7,500.00.

Filed and entered Judgment for plaintiff and against defendant for $7,500.00, and for costs for $211.35 to be hereafter taxed and allowed by the Clerk (and interest in the sum of $533.33).

15—Filed Notice of Entry of Judgment.

Filed Plaintiff's Requested Instructions Nos. 1 through 9, inclusive.

[fol. 55] Filed Defendant's Requested Instructions Nos. 1 and 2.

20—Filed Motion (of defendant) to set aside Verdict, or in the alternative, for a new trial.

24—Filed Notice of Taxation of Costs and Statement of Interest, Costs and Disbursements of Blanche Dick.

26—Costs (and interest) allowed in total sum of $744.68 (int. $533.33—costs $211.35) and Notice of Taxation filed and copies mailed to attorneys.

Dec. 14—Hearing on Motion to Set Aside Verdict set for Dec. 27, 1956, at 10:00 a.m., and attorneys notified.

27—Filed Defendant's Memorandum.

Record of hearing on Motion to Set Aside Verdict or for a new trial—motion denied.

Filed and entered Order denying motion to set aside verdict or for a new trial.

Jan. 22, 1957—Filed Notice of Appeal.

Filed Bond for Costs on appeal.

Filed Stipulation waiving supersedeas bond.

24—Filed motion to extend time for filing the record on appeal and docketing appeal.

26—Filed and entered Order extending time for filing the record on appeal and docketing appeal in U. S. Court of Appeals until April 22, 1957.

[fol. 56]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,760

New York Life Insurance Company,
a corporation, Appellant,

vs.

Blanche Dick, Appellee.

Appeal from the United States District Court for the District of North Dakota.

Norman G. Tenneson for Appellant.

Donald C. Holand and Philip B. Vogel for Appellee.

Before Sanborn, Woodbrough and Johnsen, Circuit Judges.

OPINION—February 7, 1958

Sanborn, Circuit Judge.

This is an appeal from a judgment for the plaintiff (appellee) in an action against the New York Life Insurance Company for double indemnity benefits under policies of life insurance. Jurisdiction was based on diversity of citizenship and amount in controversy.

William Dick, a North Dakota farmer, forty-seven years of age, while alone with a double-barrel shotgun in the silage shed of his farm on the morning of January 20, 1955, was twice shot by the gun. The first shot severely wounded him on the left side of his chest. The second shot was in the head and killed him instantly.

[fol. 57] At the time of his death, William Dick had two polices of life insurance issued by the New York Life Insurance Company, payable to his wife, Blanche Dick, as beneficiary. The policies were in force. Each contained a double

indemnity clause. The clause provided that double indemnity should be payable upon receipt of due proof that the death of the insured "resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means," but that such indemnity should not be payable if the insured's death resulted from "self-destruction, whether sane or insane."

Blanche Dick, claiming that the shooting was accidental, demanded double indemnity. She brought this action upon that claim. The company in its answer denied that the insured's death was the result of an accident. As an affirmative defense it alleged that his death resulted from self-destruction.

The company paid to Blanche Dick the full face of the policies. The issue whether or not the insured met his death as the result of an accident was tried to a jury. Since the insured's death obviously resulted from means which were both external and violent, the sole issue at the trial was, as a practical matter, whether the death was or was not accidental. At the close of the evidence, the company moved for a directed verdict on the grounds that the evidence was insufficient to make the issue one of fact for the jury and that it conclusively showed that the death was suicidal. The motion was denied. The jury returned a verdict for the plaintiff. The company moved that the verdict be set aside and that judgment be entered in its favor in accordance with its motion for a directed verdict, or, in the alternative, that it be granted a new trial because of alleged errors of the court during the trial. The motion was denied, and this appeal followed.

[fol. 58] The main question for decision is whether there was an adequate evidentiary basis to make the issue whether the insured's death was accidental one of fact for the jury.

The policies in suit are North Dakota contracts, and the applicable substantive law is the law of that State. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64.[1]

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[1] In *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109, the Supreme Court said:

"• • • The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit

In determining whether the company was entitled to a directed verdict, we must give to the plaintiff the benefit of all reasonable inferences which can be drawn from the evidence, viewed in the aspect most favorable to her. She is not, however, entitled to the benefit of inferences which are unreasonable (*Russell* v. *Turner*, 8 Cir., 148 F.2d 562, 565), or which are opposed to the undisputed physical facts. *Elzig* v. *Gudwangen*, 8 Cir., 91 F.8d 434, 440 and cases cited.

We find it unnecessary to outline the evidence in complete detail. We have studied it, and the parties are entirely familiar with it. The plaintiff's evidence tended to show that the insured had no motive to commit suicide; that he was a cheerful man, on excellent terms with his wife, family and friends; that he had no financial worries; that he was 5 feet 7 inches tall, weighed about 165 pounds, and was in good physical condition, except for some prostate trouble which "bothered him a little but it wasn't bad"; that he might have kept his shotgun in the barn, loaded and cocked, because of some past trouble with vicious dogs bothering and killing his sheep; that in the small [fol. 59] silage shed between the barn and the silo, where his body was found with the shotgun beside it, there was some silage on the floor which might have caused him to slip and fall; that in the evening of the day preceding his death his attitude and actions were normal, and were the same the following morning when he had breakfast with his wife and fourteen-year-old daughter; that after breakfast he got out the automobile so that his wife could take the daughter to school, and then, with his work clothes on, went about his usual farm chores and fed his cattle in the feed lot adjoining the silage shed; that it was after his wife's return from the school and after she had done her housework and was waiting for him to go with her to a cousin's house to help make bologna, that, about 10:30

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by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure,' we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, *Cities Services Co.* v. *Dunlap*, 308 U.S. 208, • • •."

A. M., she went to the barn to look for him, and found his body lying on its back on the floor of the silage shed; that she ran to the house and notified his brother and a nephew to come at once; that her husband was a hunter, experienced in the use of firearms, and had had the double-barrel shotgun which caused his death for many years; and that at the time of his death he was wearing rubbers and gloves.

There was evidence that the insured was seldom moody, and then for only brief periods; that he was an able-bodied, strong man; and that nothing he had done or said gave any indication that he contemplated suicide.

The defendant's evidence related largely to the physical facts indicating where and how the death occurred and what caused it. The evidence showed that the Sheriff of the County and the Coroner, Dr. Veitch, who was also the insured's physician and a medical examiner for the insurance company, arrived at the farm about 11:00 A. M. on January 20. The Sheriff testified that the body was lying on its back, with the head in the direction of the silo and [fol. 60] the feet toward the door leading from the shed to the outside; that the eyes and frontal part of the head were torn off; that he observed a powder burn above the left ear; that the gun was lying alongside the body, about 18 inches away, with the stock toward the feet and the muzzle about at the chest; that the Sheriff took possession of the gun, a twelve-gauge Stevens double-barrel shotgun with two triggers, one ahead of the other; that the front trigger fires the right barrel, and the rear trigger fires the left; that there is a safety device on top of the stock, just behind the device which "breaks" the gun; that the safety device has to be pushed forward before the gun can be fired; that he made various tests with the gun "off safe" to see whether it could be fired by dropping or jarring it, and found that the triggers would not release; that it required about a seven-pound pull to touch off the triggers; that during his investigation in the shed he picked up the gun, "broke" it, and found two discharged shells in the chambers; that he found two 12-gauge loaded shells in the deceased's jacket; that he took possession of the clothing worn by William Dick when he died; that in the silage shed he also saw a screwdriver eight to ten inches long, located about eight or

ten inches from the gun and to the left of it; that the gun was dry and clean; that tissue blown from the head was in the southeast corner of the shed and partly on the outside door and the east wall, covering an area of five or six feet, most of it four or five feet from the ground; that there were also shot particles on the wall in several different places, probably six or eight feet from the door leading in from the barn, on the east side of the shed; that he saw no shot on the north wall; that there was a cap lying on the floor near the wall to the right of the head of William Dick; that after the body had been taken to the funeral parlor, he saw the wound in the left side of the chest; that [fol. 61] in his opinion the shot that made this wound was from the ground upward; that there were holes in the outside jacket and the shirt corresponding to the location of the chest wound.

The testimony of Dr. Veitch, the Coroner, corroborated that of the Sheriff as to the location of the body in the shed and the nature and extent of the wounds. He testified that the head wound caused the death, that the chest wound was mortal but not immediately fatal, and that it would shortly have caused Dick's death; that it was terribly painful but would not have caused him to lose consciousness; that the pain must have been unbearable; that the doctor's opinion was that after the chest wound the insured could still have fired the shotgun; that the gun was eight to twelve inches away from the body, and the screwdriver further away; that he observed definite powder marks on the skin of the left forehead in front of the left ear; that "they extended a half inch to an inch, quite a high concentration of a powder burn."

Dr. Veitch also testified that from September 13 to December 30, 1954, he had been treating the insured for "a form of mild to moderate non-specific prostatitis"; that the insured called upon the doctor for treatment twice in September, three times in October, twice in November, and the last time on December 30, when Dick "was in a very fine state of mind and wished me a happy New Year"; that the symptoms of his trouble were ache and pain; that his illness would not prevent him from doing his work:

that "He would do his work every day in spite of the misery he was having."

The doctor testified that in connection with the claim of Blanche Dick against the defendant he signed some proofs of death, which, under "Cause of death," stated "Death [fol. 62] from self inflicted shotgun wounds, 1. Left chest. 2. Frontal area of head."

There was testimony that an examination of the jacket worn by the insured showed powder marks on the front near the hole where the shot entered.

There was other testimony tending to support the defendant's theory that the death of the insured was not an accident.

There are certain facts which we think were definitely established by the evidence: 1. That the insured was a man of good character and reputation, who had no adequate reason for taking his own life. 2. That the wounds inflicted upon him came from shots from his own shotgun, which he must himself have loaded and cocked. 3. That the shots came from in front of and in close proximity to his body. 4. That the shotgun was in good working order, was off safety and was ready to be fired when it was fired. 5. That neither barrel could have been fired unless someone or something either pulled or pushed one of the triggers. 6. That no person other than the insured could have pulled or pushed a trigger, and that there was nothing to account for one barrel of the gun being first fired accidentally into his chest and the second barrel being then fired accidentally into his head. The improbability of his being able to pull the triggers with bulky gloves on is offset by the strong probability that the screwdriver was used to push the triggers, and that he could not otherwise have reached the triggers so as to inflict the wounds he received.

One can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one bar- [fol. 63] rel and then with the other stretches credulity beyond the breaking point.

The Supreme Court of North Dakota has held that proof of death by gunshot wound plus the presumption of acci-

dental death makes a prima facie case that death was accidental, and "that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or non-intentional injury." *Svihovec* v. *Woodmen Accident Co.*, 69 N.D. 259, 285 N.W. 447, 449.

If the facts and circumstances surrounding the death of the insured can be reconciled with any reasonable theory of accidental injury the judgment appealed from should be affirmed, but if they cannot the judgment should be reversed.

Our conclusion is that the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury. Compare, *Burkett* v. *New York Life Ins. Co.*, 5 Cir., 56 F.2d 105, and *Svihovec* v. *Woodmen Accident Co.*, supra.

The judgment is reversed with directions to enter a judgment dismissing the complaint.

[fol. 64]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15760—September Term, 1957.

[Title omitted]

Appeal from the United States District Court for the District of North Dakota.

JUDGMENT—February 7, 1958

This cause came on to be heard on the record from the United States District Court for the District of North Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby,

reversed with costs; and that the New York Life Insurance Company, a corporation, have and recover against Blanche Dick the sum of Two Hundred Seventy-eight and 50/100 Dollars for its costs in this behalf expended, and have execution therefor.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a judgment dismissing the complaint.

February 7, 1958.

[fol. 65] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 66]

SUPREME COURT OF THE UNITED STATES

No. 957—October Term, 1957

BLANCHE DICK, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation.

ORDER ALLOWING CERTIORARI—June 23, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Harlan took no part in the consideration or decision of this application.

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APR 28 1958
JOHN T. FEY, Clerk

No. 558

In the Supreme Court of the United States

1958

BLANCHE DICK
Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

PERSHING BOE
Fargo, North Dakota
(Counsel of Record)
DONALD C. HOLAND
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PHILIP B. VOGEL
Fargo, North Dakota
Attorneys for Petitioner

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In the
Supreme Court of the United States

BLANCHE DICK

Petitioner

VS.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Blanche Dick, prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered and rendered against the petitioner on the 7th day of February, 1958. The opinion upon which this judgment is based is dated February 7, 1958. It is reported as case No. 15,760 in 252 F. 2d 43. Copies of the judgment and opinion are attached.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed is dated February 7, 1958 and it was entered on that day.

The petitioner relies upon the provisions of Amendment VII to the United States Constitution which preserves for her the right of trial by jury and *28 U. S. C. A.*, Section 2101 to have writ of certiorari granted, and to sustain the jurisdiction of this court.

QUESTIONS PRESENTED FOR REVIEW

Denial of trial by jury

Can the Circuit Court of Appeals deny Mrs. Dick, the petitioner, a trial by jury where there is evidence in the record consistent with accidental death, and where a jury has found that the death was not a suicide, and where the trial judge has refused to set aside the verdict of the jury?

Refusal to follow state law

Did the Circuit Court of Appeals have the right to refuse to follow the North Dakota law which for more than 50 years has held that the question of whether a death is suicidal is for the jury where there is evidence in the record consistent with accidental death? In this case the opinion of the Circuit Court of Appeals acknowledges that there was such evidence.

CONSTITUTIONAL PROVISIONS

The constitutional provision involved is Amendment VII found in *U. S. C. A.*, Constitution, page 379. It reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

A CONCISE STATEMENT OF THE CASE

William Dick was a 47 year old farmer living on his farm near Englevale, North Dakota. On January 20, 1955 he died as a result of two shots from an old double barreled

shot gun. Death occurred in a silo shed at about 10 a.m. while he was in the process of doing his chores.

Mr. Dick was a happy, well adjusted man in good health. He was a man of modest means with no financial problems. The night before he died he took the time to help his 14 year old daughter with her General Science studies (R. p. 18). He slept soundly, ate a hearty breakfast, milked his cows, and had planned to help his neighbor make sausage (R. p. 8). He had said or done nothing to indicate that he contemplated suicide (Circuit Court Opinion, page 12).

Mr. Dick had commenced to feed his cattle at the outside feed troughs. It was his practice to put silage in the troughs, get a tub full of ground corn and then spread it over the silage (R. p. 13). A tub filled with ground corn was found a couple of steps from the feed troughs on the barn side of the fence (R. p. 16). The feed troughs were located just north of the silo, and Mr. Dick's body was found just inside the south door of the silo room (R. p. 11).

Mrs. Dick discovered the body after she had returned from taking their daughter to school. There was a sprinkle of silage on the floor and on the steps of the silo shed. It was wet and more or less frozen (R. p. 13). Mr. Dick was wearing a jacket that was zippered up. He wore heavy fleecy gloves that could only with difficulty be inserted in the gun trigger guard (R. p. 22). There was no blood on these gloves. There was no blood on the gun.

There were two wounds. The wound along the chest was a grazing wound (R. p. 22). It was *not* pointed at the heart or any other vital organ. The second was a head wound and it caused instant death (R. p. 26).

Several months prior to his death Mr. Dick had trouble with vicious dogs. A few sheep were lost and quite a few

were mangled. A fox and badger had been seen around the farm yard. The gun was kept in the barn (R. p. 9). It was at least 28 years old (R. p. 10). On at least one recent occasion the gun had discharged accidentally (R. pp. 34-36).

A screwdriver was kept in the shed for the purpose of opening the south door because the knob was off (R. p. 10). Mr. Dick would have used this screwdriver if he intended to go out the south door of the shed. The sheriff who investigated did not know the length of this screwdriver (R. p. 21), nor did the sheriff ever have the screwdriver in his possession so as to determine that the gun could be fired by using the screwdriver.

Mrs. Dick did not start this lawsuit in the federal court. She commenced the action in the North Dakota State Court. It was removed to the federal court because $7,500 was involved and there was diversity of citizenship. The removal was brought about by the insurance company. The jury found that the death was not a suicide. The trial court refused to overturn the verdict. The circuit court granted judgment for the insurance company.

ARGUMENT

There were obvious questions of fact involved in this lawsuit and the circuit court's decision has denied to the petitioner her right to trial by jury under Amendment VII of the United States Constitution. The circuit court's decision is in conflict with *all* relevant decisions of the North Dakota Supreme Court. Its decision is on an important question of North Dakota law. The North Dakota Supreme Court has held for 50 years that suicide cases are to be submitted to the jury where there is evidence consistent with accidental death. There was abundant evidence of ac-

cidental death in this case. The circuit court in its decision acknowledges that for it weighs the evidence and states:

> "The improbability of his being able to pull the triggers with bulky gloves on is offset by the strong probability that the screwdriver was used to push the triggers, and that he could not otherwise have reached the triggers so as to inflict the wounds he received."

We think that the court's weighing of the evidence is faulty and that the improbability that a man wishing to take his own life would draw on heavy, bulky gloves that could hardly be forced into the trigger guard, and the fact that there would be no blood on these gloves is of far greater significance than the presence of a screwdriver. The latter was not important to the jury. The circuit court has drawn a speculative inference from the screwdriver which the jury did not and was not compelled to draw.

At no time, either in the district court or in the circuit court did the insurance company cite a single North Dakota holding that this case should not have been submitted to the jury. It was the position of the insurance company that the North Dakota rule was not applicable and that the court should apply what they described as "the modern rule and the best rule." The decision of the 8th circuit is clearly in conflict with the North Dakota law. Under *Erie v. Tompkins*, 304 U. S. 64, 82 Law Ed. 1188 it was required to follow that law and this it did not do.

In addition to all of the affirmative evidence outlined above and in the statement of the case in North Dakota there is a presumption against suicide and this presumption has the weight of affirmative evidence. It stays with the plaintiff all through the lawsuit. The most recent holding is *Svihovec v. Woodmen Acc. Co.* (N. D. 1939), 69 N. D. 259, 285 N. W. 447.

"The rule announced by this court in Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862, gave to the presumption in favor of accidental death the weight of affirmative evidence. It was there held that proof of death by gunshot wound, aided by this presumption, was sufficient to establish a prima facie case of accidental death, and that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or non intentional injury. Defendant contends for a modification of this rule and its brief presents a scholarly and persuasive argument in support of that contention. Despite the logic of defendant's argument and the weight of the authority presented to support it, we feel we must adhere to the rule above set forth. That rule was affirmed by this court in Clemens v. Royal Neighbors, 14 N. D. 116, and it follows as a fair construction of sections 7934 and 7936 Compiled Laws of North Dakota. 1913."

Svihovec v. Woodmen Acc. Co. (N. D. 1939), 285 N. W. 447.

In the case of *Clemens v. Royal Neighbors of America* (N. D. 1905), 14 N. D. 116, 103 N. W. 402 the insured talked to his religious advisor, wrote a note saying, "Bury me at Leonard. Kiss the children for me. Don't take this too hard." The lower court directed a verdict for the insurance company and the North Dakota Supreme Court held that this was proper, and laid down the rule that has been followed in North Dakota for more than 50 years.

"The plaintiffs insist that these undisputed facts should have been submitted to the jury, to determine whether Clemens' death was caused by his own voluntary act or by other means. The presumption is that a death caused by unexplained means was not suicidal. In the absence of proof, such death will be

presumed to have been caused by accidental means. Stevens v. Continental Casualty Co., 12 N. W. 469, 97 N. W. 862, and cases cited. And the burden of proof is upon the insurer to show that death was caused in a manner or by means that exempt him from liability. Has the presumption of law that death was not caused by suicide been overcome by the defendant, as a matter of law? If so, the direction of a verdict was proper. If reasonable men, viewing these undisputed facts, might differ in their conclusions as to whether the deceased committed suicide, then the facts should have been submitted to the jury. *If there is no evidence in the record that can be said to be inconsistent with the conclusion of death by suicide, then the question was properly one for the court to direct the jury to find verdict for the defendant.* We think the facts all point to death by suicide, and are inconsistent with any other reasonable theory. If it be said that it might have been an accidental death, or one criminal by another, the note conclusively rebuts such possibility. The circumstances of meeting his employer, his shortage, and the impending exposure that must follow, the note, the position of the wound, the blood on the revolver and on the mirror, and that he was alone in the room are sufficient facts, as a matter of law, to overcome the presumption against a death by suicidal means. A verdict for the plaintiff under such circumstances could not be sustained, and *would be without any evidence to support it.*" (Italics supplied.)

Clemens v. Royal Neighbors (N. D. 1905), 14 N. D. 116, 103 N. W. 402.

That case represents the law in North Dakota. It may be and probably is different from the law in most jurisdictions, but it is the law that the federal court was bound to follow. In the trial of this lawsuit in the district court and in the appellate proceedings in the circuit court the insurance company cited no North Dakota cases to the con-

trary. It contented itself with taking the position that this North Dakota rule was not applicable and that the court should adopt what it called "the modern rule and the best rule."

We recognize that writs are sparingly granted, but the failure to follow the North Dakota law and the denial to Mrs. Dick of her right to trial by jury, is of sufficient importance, not only to the petitioner, but to other citizens of North Dakota, that we submit the writ should be allowed.

Wherefore, it is respectfully submitted that petitioner's prayer for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeal should be granted.

Dated April 21, 1958.

PERSHING BOE
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(Counsel of Record)
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Attorneys for Petitioner

APPENDIX

United States Court of Appeals
For The Eighth Circuit.

No. 15,760.

New York Life Insurance Company, a corporation,
Appellant,

vs.

Blanche Dick,
Appellee.

[February 7, 1958.]

Appeal From The United States District Court For The District Of North Dakota

OPINION

Norman G. Tenneson for appellant; Donald C. Holand and Philip B. Vogel for appellee.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Sanborn, Circuit Judge.

This is an appeal from a judgment for the plaintiff (appellee) in an action against the New York Life Insurance Company for double indemnity benefits under policies of life insurance. Jurisdiction was based on diversity of citizenship and amount in controversy.

William Dick, a North Dakota farmer, forty-seven years of age, while alone with a double-barrel shotgun in the silage shed of his farm on the morning of January 20, 1955, was twice shot by the gun. The first shot severely wounded him on the left side of his chest. The second shot was in the head and killed him instantly.

At the time of his death, William Dick had two policies of life insurance issued by the New York Life Insurance Company, payable to his wife, Blanche Dick, as beneficiary. The policies were in force. Each contained a double indemnity clause. The clause provided that double indemnity should be payable upon receipt of due proof that the death of the insured "resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means," but that such indemnity should not be payable if the insured's death resulted from "self-destrucion, whether sane or insane."

Blanche Dick, claiming that the shooting was accidental, demanded double indemnity. She brought this action upon that claim. The company in its answer denied that the insured's death was the result of an accident. As an affirmative defense it alleged that his death resulted from self-destruction.

The company paid to Blanche Dick the full face of the policies. The issue whether or not the insured met his death as the result of an accident was tried to a jury. Since the insured's death obviously resulted from means which were both external and violent, the sole issue at the trial was, as a practical matter, whether the death was or was not accidental. At the close of the evidence, the company moved for a directed verdict on the grounds that the evidence was insufficient to make the issue one of fact for the jury and that it conclusively showed that the death was

suicidal. The motion was denied. The jury returned a verdict for the plaintiff. The company moved that the verdict be set aside and that judgment be entered in its favor in accordance with its motion for a directed verdict, or, in the alternative, that it be granted a new trial because of alleged errors of the court during the trial. The motion was denied, and this appeal followed.

The main question for decision is whether there was an adequate evidentiary basis to make the issue whether the insured's death was accidental one of fact for the jury.

The policies in suit are North Dakota contracts, and the applicable substantive law is the law of that State. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64.[1]

In determining whether the company was entitled to a directed verdict, we must give to the plaintiff the benefit of all reasonable inferences which can be drawn from the evidence, viewed in the aspect most favorable to her. She is not, however, entitled to the benefit of inferences which are unreasonable (*Russell v. Turner*, 8 Cir., 148 F. 2d 562, 565), or which are opposed to the undisputed physical facts. *Elzig v. Gudwangen*, 8 Cir., 91 F. 2d 434, 440 and cases cited.

We find it unnecessary to outline the evidence in complete detail. We have studied it, and the parties are entirely familiar with it. The plaintiff's evidence tended to

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[1] In *Guaranty Trust Co. v. York*, 326 U. S. 99, 109, the Supreme Court said:

"* * * The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure,' we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, *Cities Service Co. v. Dunlap*, 308 U. S. 208, * * *."

show that the insured had no motive to commit suicide; that he was a cheerful man, on excellent terms with his wife, family and friends; that he had no financial worries; that he was 5 feet 7 inches tall, weighed about 165 pounds, and was in good physical condition, except for some prostate trouble which "bothered him a little but it wasn't bad"; that he might have kept his shotgun in the barn, loaded and cocked, because of some past trouble with vicious dogs bothering and killing his sheep; that in the small silage shed between the barn and the silo, where his body was found with the shotgun beside it, there was some silage on the floor which might have caused him to slip and fall; that in the evening of the day preceding his death his attitude and actions were normal, and were the same the following morning when he had breakfast with his wife and fourteen-year-old daughter; that after breakfast he got out the automobile so that his wife could take the daughter to school, and then, with his work clothes on, went about his usual farm chores and fed his cattle in the feed lot adjoining the silage shed; that it was after his wife's return from the school and after she had done her housework and was waiting for him to go with her to a cousin's house to help make bologna, that, about 10:30 a.m., she went to the barn to look for him, and found his body lying on its back on the floor of the silage shed; that she ran to the house and notified his brother and a nephew to come at once; that her husband was a hunter, experienced in the use of firearms, and had had the double-barrel shotgun which caused his death for many years; and that at the time of his death he was wearing rubbers and gloves.

There was evidence that the insured was seldom moody, and then for only brief periods; that he was an able-bodied, strong man, and that nothing he had done or said gave any indication that he contemplated suicide.

The defendant's evidence related largely to the physical facts indicating where and how the death occurred and what caused it. The evidence showed that the Sheriff of the County and the Coroner, Dr. Veitch, who was also the insured's physician and a medical examiner for the insurance company, arrived at the farm about 11:00 a.m. on January 20. The Sheriff testified that the body was lying on its back, with the head in the direction of the silo and the feet toward the door leading from the shed to the outside; that the eyes and frontal part of the head were torn off; that he observed a powder burn above the left ear; that the gun was lying alongside the body, about 18 inches away, with the stock toward the feet and the muzzle about at the chest; that the Sheriff took possession of the gun, a twelve-gauge Stevens double-barrel shotgun with two triggers, one ahead of the other; that the front trigger fires the right barrel, and the rear trigger fires the left; that there is a safety device on top of the stock, just behind the device which "breaks" the gun; that the safety device has to be pushed forward before the gun can be fired; that he made various tests with the gun "off safe" to see whether it could be fired by dropping or jarring it, and found that the triggers would not release; that it required about a seven-pound pull to touch off the triggers; that during his investigation in the shed he picked up the gun, "broke" it, and found two discharged shells in the chambers; that he found two 12-gauge loaded shells in the deceased's jacket; that he took possession of the clothing worn by William Dick when he died; that in the silage shed he also saw a screwdriver eight to ten inches long, located about eight or ten inches from the gun and to the left of it; that the gun was dry and clean; that tissue blown from the head was in the southeast corner of the shed and partly on the outside

door and the east wall, covering an area of five or six feet, most of it four or five feet from the ground; that there were also shot particles on the wall in several different places, probably six or eight feet from the door leading in from the barn, on the east side of the shed; that he saw no shot on the north wall; that there was a cap lying on the floor near the wall to the right of the head of William Dick; that after the body had been taken to the funeral parlor, he saw the wound in the left side of the chest; that in his opinion the shot that made this wound was from the ground upward; that there were holes in the outside jacket and the shirt corresponding to the location of the chest wound.

The testimony of Dr. Veitch, the Coroner, corroborated that of the Sheriff as to the location of the body in the shed and the nature and extent of the wounds. He testified that the head wound caused the death, that the chest wound was mortal but not immediately fatal, and that it would shortly have caused Dick's death; that it was terribly painful but would not have caused him to lose consciousness; that the pain must have been unbearable; that the doctor's opinion was that after the chest wound the insured could still have fired the shotgun; that the gun was eight to twelve inches away from the body, and the screwdriver further away; that he observed definite powder marks on the skin of the left forehead in front of the left ear; that "they extended a half inch to an inch, quite a high concentration of a powder burn."

Dr. Veitch also testified that from September 13 to December 30, 1954, he had been treating the insured for "a form of mild to moderate non-specific prostatitis"; that the insured called upon the doctor for treatment twice in September, three times in October, twice in November, and

the last time on December 30, when Dick "was in a very fine state of mind and wished me a happy New Year"; that the symptoms of his trouble were ache and pain; that his illness would not prevent him from doing his work; that "He would do his work every day in spite of the misery he was having."

The doctor testified that in connection with the claim of Blanche Dick against the defendant he signed some proofs of death, which, under "Cause of death," stated "Death from self inflicted shotgun wounds, 1. Left chest, 2. Frontal area of head."

There was testimony that an examination of the jacket worn by the insured showed powder marks on the front near the hole where the shot entered.

There was other testimony tending to support the defendant's theory that the death of the insured was not an accident.

There are certain facts which we think were definitely established by the evidence: 1. That the insured was a man of good character and reputation, who had no adequate reason for taking his own life. 2. That the wounds inflicted upon him came from shots from his own shotgun, which he must himself have loaded and cocked. 3. That the shots came from in front of and in close proximity to his body. 4. That the shotgun was in good working order, was off safety and was ready to be fired when it was fired. 5. That neither barrel could have been fired unless someone or something either pulled or pushed one of the triggers. 6. That no person other than the insured could have pulled or pushed a trigger; and that there was nothing to account for one barrel of the gun being first fired accidentally into his chest and the second barrel being then fired accidentally into his head. The improbability of his

being able to pull the triggers with bulky gloves on is offset by the strong probability that the screwdriver was used to push the triggers, and that he could not otherwise have reached the triggers so as to inflict the wounds he received.

One can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one barrel and then with the other stretches credulity beyond the breaking point.

The Supreme Court of North Dakota has held that proof of death by gunshot wound plus the presumption of accidental death makes a prima facie case that death was accidental, and "that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or non-intentional injury." *Svihovec v. Woodmen Accident Co.*, 69 N. D. 259, 285 N. W. 447, 449.

If the facts and circumstances surrounding the death of the insured can be reconciled with any reasonable theory of accidental injury the judgment appealed from should be affirmed, but if they cannot the judgment should be reversed.

Our conclusion is that the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury. Compare, *Burkett v. New York Life Ins. Co.*, 5 Cir., 56 F. 2d 105, and *Svihovec v. Woodmen Accident Co., supra.*

The judgment is reversed with directions to enter a judgment dismissing the complaint.

United States Court of Appeals
For The Eighth Circuit

No. 15760
September Term, 1957.
Friday, February 7, 1958.

New York Life Insurance Company, a corporation,
Appellant,

vs.

Blanche Dick,
Appellee.

Appeal From The United States District Court For The District Of North Dakota

---

ORDER

This cause came on to be heard on the record from the United States District Court for the District of North Dakota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the New York Life Insurance Company, a corporation, have and recover against Blanche Dick the sum of Two Hundred Seventy-eight and 50/100 Dollars for its costs in this behalf expended, and have execution therefor.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a judgment dismissing the complaint.

Dated February 7, 1958.

CLERK'S CERTIFICATE

I, Eugene C. Fisher, Acting Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains printed record on which the appeal from the United States District Court for the District of North Dakota was heard and decided in said Court of Appeals in the case of New York Life Insurance Company, a corporation, appellant, v. Blanche Dick, appellee, No. 15760, together with full, true and complete copies of opinion and judgment of said Court of Appeals.

And I do further certify that on the 28th day of February, A. D. 1958, mandate was issued out of said Court of Appeals in said cause, directed to the Judges of the United States District Court for the District of North Dakota.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 20th day of March, A. D. 1958.

/s/ EUGENE C. FISHER,
Acting Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal of the Court)

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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 957
CIVIL

BLANCHE DICK
Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM 1957

No. 957
CIVIL

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Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner's statement of the case is incomplete. It omits certain very material facts which were developed at the trial. Hence this supplementary statement is submitted. The petitioner, Blanche Dick, was beneficiary of two life insurance policies issued by the respondent to her husband, William Dick. Both policies provided for double indemnity benefits in the event of accidental death. The single indemnity benefits were paid after commencement of suit, leaving the only issue for trial the right to recover the double indemnity benefits (R. 40, 48).

Petitioner alleged and respondent denied that the insured's death "resulted directly, and independently of all other

causes, from bodily injury effected solely through external, violent and accidental means", as limited and defined in the double indemnity provisions of both policies. As an affirmative defense, respondent alleged that the death of the insured resulted from suicide or self-destruction, making applicable the policy provisions that double indemnity benefits were not payable if death resulted from "self-destruction, whether sane or insane" (R. 7).

The action was tried to a jury resulting in a verdict in favor of petitioner for $7,500.00 (R. 49).

The insured's death occurred on January 20, 1955. His body was discovered by his wife when she entered the barn to call him. Receiving no answer, she entered the little silage shed between the barn and silo (Pl. Ex. 7; R. 11). It was then between 10:30 and 11:00 a.m. She saw her husband in the shed, lying on his back with his feet facing the south or outer door of the silo. She observed the wound on his head and knew he was dead. His double-barreled shotgun was lying near the body. He was dressed in blue overalls and jacket and had gloves on (R. 8, 9, 10).

Mrs. Dick called George Dick, a brother, who went to the silo shed and looked in. The deceased's left foot was on the floor and his right cocked against a 2 x 4 east of the south door. His forehead and eyes were completely gone. Defendants's Exhibit 11 (R. 15) is a picture posed by George Dick showing the location of the deceased's body in the position it was lying when he saw it. The gun, which was a double-barrel 12-gauge shotgun with two trigers, one in back of the other, was lying about 3 feet from the body with the butt near the feet and the barrel alongside the head. The body was clothed in a blue bib overall,

yellow flannel gloves, and work jacket with a zipper (R. 13, 14).

He found a concentration of shot pellets in the northwest corner of the shed and shot marks in the southeast corner on the east wall, south of the door, 3 or 4 feet from the floor. Pieces of human flesh were spattered about, mostly on the south door and above on the roof (R. 13).

The decedent's gun was usually kept in the barn. He had gone hunting every fall since 1926 for pheasants, deer, ducks and geese, and on these trips used the shotgun found near the body. He was experienced and careful in the use of firearms (R. 9, 10, 14).

Mr. Dick was very seldom a moody man. If he had anything on his chest, he would get it off and forget about it. These moody intervals were not frequent (R. 13, 14).

Mr. Noice, the County Sheriff, arrived at the farm about 11:00 a.m. He observed what he believed to be powder burns about an inch above the decedent's left ear. The gun was about 18 inches from the body with the stock toward the feet and the barrel along the body. The end of the muzzle was at about the chest. He took possession of the gun. It was a 12-gauge double-barrel Stevens gun with two triggers, placed one ahead of the other. The front trigger fires the right barrel and the rear trigger the left barrel. It weighed about 7 pounds. There is a safety device located on top of the stock behind the barrels and behind the device which breaks the gun. Before the gun can be fired, the safety device must be released by pushing the button ahead. It would not fire otherwise (R. 18, 19).

While in the shed, the Sheriff picked up the gun. It was dry and clean. He broke it and found two discharged 12-gauge shells in the chambers, which he removed. He observed a screw driver 8 to 10 inches long lying to the left

of the gun barrel and about 8 to 10 inches from it (R. 20).

The Sheriff made numerous tests with the gun to see if it would fire by jarring, pounding, or dropping it. All these tests were made with the gun off safe. In no instance did the triggers fire during these tests. They were made in the basement of the Courthouse. The gun was held with the muzzle pointing toward the ground and dropped a distance of about 10 inches to a board. This test was made about 10 times. The gun was then held with the butt about 10 inches from the floor and dropped to a board. This test was made 8 or 10 times. Next, the gun was placed in normal shooting position against the right shoulder with the barrel in the Sheriff's left hand and the stock in his right hand. He struck it against the board 3 or 4 times. The butt was placed on the floor and the barrel allowed to fall on a board (R. 19, 20). Tests of the trigger pull were also made by the Sheriff with a spring scale. It required approximately 7 pounds pull to fire the triggers. This test was made twice with both triggers, with the same result (R. 19, 20, 22).

After the body was removed to the funeral parlors, the Sheriff observed for the first time a wound on the left side of the decedent's body. It was about 5 inches long, pear-shaped and grazed the ribs. Defendant's Exhibit 17 (R. 25) shows the wound. The photograph was taken about two hours after the body was brought to the funeral home (R. 21, 22).

Dr. Veitch, the County Coroner, accompanied the Sheriff to the Dick farm and made an investigation as part of his official duties. He stated that the decedent's forehead and eyes were gone. The bone and tissue in front of the ears were gone, with the brain contents in plain sight. There was some red meat tissue or blood spatter on the south door and also on the north wall, mostly on the

upper half, with the area of greatest concentration on the south door (R. 23, 24).

About an hour and a half after he was at the farm, he examined the body in the funeral home when the clothing had been removed. He found another wound in the chest. It was a furrow type on the left lateral chest wall, extending about 5½ inches in length. The top was about 2½ to 3 inches below the left nipple with the greatest width about 2½ inches (R. 24).

He testified the wound to the head caused immediate death. The chest wound did not do so. It would have eventually caused death within one day to two weeks. The chest wound was terrifically painful, but did not result in loss of consciousness. Its chief consequence would be pain. The deceased would have the capacity to pull the trigger of a shotgun after receiving the chest wound (R. 26).

When he examined the body in the funeral parlor, the doctor observed definite powder marks on the skin of the left forehead in front of the ear. There was a high concentration of a powder burn extending a half inch to an inch (R. 30).

As a physician, he attended the deceased 8 times between September 13, 1954 and December 30, 1954. Mr. Dick had a mild to moderate non-specific prostatitis, was tired and felt pepless. He was put on sulpha therapy and received hormone injections each time after the first visit to the doctor. His illness did not prevent him from doing farm work. He would do it in spite of the misery he was having (R. 30, 31).

Dr. Veitch completed and signed Defendant's Exhibit 9 (R. 35), in connection with petitioner's claim for benefits under the policies. It shows death was due to "Suicide".

A firearms expert testified that when fired at close

range, the burning powders and gases from guns leave marks called powder burns. He found powder burns on the fabric of the decedent's outer jacket. These marks were at the holes toward the front of the jacket, and there were none at the hole to the rear. These burns were about an inch on each side of the top and bottom of the front hole. The direction of the shot charge, according to the holes present in the jacket, was front to rear (R. 32).

An inquest on the death of William Dick was held by a coroner's jury on January 28, 1955. A verdict of "suicide" was returned. The verdict was annulled and set aside by order of the District Court of Ransom County, North Dakota, on May 19, 1955, for want of compliance with statutory provisions regarding the time and manner of impanelling and administering the oath to the jury (R. 34).

ARGUMENT

I.

No denial of trial by jury.

The constitutional ground asserted by petitioner is that the decision of the Court of Appeals which set aside the verdict of the jury and dismissed the action, in effect deprived her of a trial by jury, contrary to the Seventh Amendment to the Constitution. The action was originally commenced in state court and was removed to the Federal Court by respondent because of diversity of citizenship. A jury trial was demanded and the case was tried before a jury. At the conclusion of the evidence, the respondent made a motion for a directed verdict, which was denied by the trial court (R. 38). The jury returned a verdict for petitioner. Respondent then moved to set aside the verdict

in accordance with its motion for a directed verdict, which was also denied by the trial court (R. 50-53). Appeal was then taken by the respondent to the Court of Appeals. That court, after reviewing the record, set aside the verdict and dismissed the action.

It is apparent that petitioner was not denied a trial by jury. The Court of Appeals held that the facts and circumstances surrounding the death of the insured could not be reconciled with any reasonable theory of accidental injury. Under the evidence, that court held that there was no question of fact for the jury and that petitioner had not made out a case. What petitioner is really contending for here is that the appellate court must accept the jury finding, and has no right to review the sufficiency of the evidence. A similar contention was made in *Galloway v. United States,* 319 U. S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077. This was a suit on a contract of war risk insurance to recover total disability benefits. At the close of the evidence the District Court granted the motion for a directed verdict, which was affirmed by the Court of Appeals. Both courts held the evidence legally insufficient to sustain a verdict for petitioner. This court, in an opinion by Justice Rutledge, said:

> "If the intention is to claim generally that the Amendment (7th) deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U. S. 450, 85 L. Ed. 945, 61 S. Ct. 637. The objection therefore comes too late."
>
> 319 U. S. 389, 87 L. Ed. 1470.

The ruling by the District Court or the Court of Appeals, where a review of the facts is sought by a motion for directed verdict at the close of all the evidence, presents a question of law. No denial of trial by jury is involved where the court exercises its inherent right to pass upon the sufficiency of the evidence. This practice is so well established that no extended argument is necessary. Mr. Justice Frankfurter has said:

> "Any notion that the practice of directing verdicts offends the Seventh Amendment was laid to rest in Galloway v. United States, 319 U. S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077."
>
> Footnote 11. *Rogers v. Missouri P. R. Co.*, 352 U. S. 541, 1 L. Ed. 2d 530, (Separate opinion).

II.

Court of Appeals followed state law.

It is asserted by petitioner that the Court of Appeals refused to follow the established North Dakota law in cases of this character where the ultimate question is whether the insured's death was accidental or suicidal. An examination of the appellate court's opinion clearly discloses that the court considered the policies to be North Dakota contracts and that the substantive law of that state was applicable, citing *Erie Railroad Co. v. Tompkins*, 304 U. S. 64.

The most recent holding of the North Dakota Supreme Court is *Svihovec v. Woodmen Acc. Co.*, 69 N. D. 259, 285 N. W. 447. The Court of Appeals in passing upon the question of whether the verdict should stand, expressly refers to the *Svihovec* case and applies the rule there stated.

> "The Supreme Court of North Dakota has held that proof of death by gunshot wound plus the presumption of accidental death makes a prima facie case

that death was accidental, and 'that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or non-intentional injury.' Svihovec v. Woodmen Accident Co., 69 N. D. 259, 285 N. W. 447, 449.

"If the facts and circumstances surrounding the death of the insured can be reconciled with any reasonable theory of accidental injury the judgment appealed from should be affirmed, but if they cannot the judgment should be reversed."

Petition for Writ of Certiorari, p. 16.

The decisive factual elements which led Circuit Judge Sanborn to reverse the judgment are set out in the two following paragraphs quoted from the opinion:

"One can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one barrel and then with the other stretches credulity beyond the breaking point.

"Our conclusion is that the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury. Compare, Burkett v. New York Life Ins. Co., 5 Cir., 56 F. 2d 105, and Svihovec v. Woodmen Accident Co., supra."

Petition for Writ of Certiorari, p. 16.

In weighing the sufficiency of the evidence, the appellate court gave petitioner the benefit of all reasonable inferences which could be drawn from the evidence viewed in the aspect most favorable to her, but was forced to the

conclusion that the verdict could not stand. To grant the writ would be asking this court to go over the same ground so carefully and thoroughly discussed and analyzed in the opinion of the court below.

III.

No public question involved.

Does this case raise issues important enough for this court's consideration and adjudication? Petitioner concedes that writs of certiorari are sparingly granted. A review is granted only where there are "special and important reasons therefor". Rule 19, Supreme Court Rules. It is submitted that the issues in this case are not of general importance to either the public or other citizens of North Dakota to justify the exercise of this court's jurisdiction. It is essentially and basically private litigation between the beneficiary of life insurance policies and an insurance company. Concededly the outcome of the case is important to the parties. Such litigation is not uncommon and each case involves different factual elements so that there is no issue of law of controlling importance to be laid down which will be applicable to subsequent litigation. Should the practice be established of permitting a review of cases of a similar nature, further burdens would be imposed upon the Supreme Court to the detriment of cases of general public importance.

The effect of granting the writ would require that the Supreme Court review a case in which the sole question is the sufficiency of the evidence for submission to the jury. A second appellate court will then be required to review the evidence and the specific factual situation developed in the trial court and carefully reviewed in the Court of Ap-

peals. It has been well said that there must be an end to litigation. The words of Mr. Justice Frankfurter in the *Rogers* case, *supra,* that the course of argument and briefs on the merits "may reveal more clearly that the only thing in controversy is an appraisal of facts on which this court is being asked to make a second guess, to substitute its assessment of the testimony for that of the court below," 352 U. S. 528, 1 L. Ed. 2d 522, are particularly applicable to this case.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

Dated June 2, 1958.

Respectfully submitted,

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Respondent's Brief on the Merits

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In the Supreme Court of the United States

BLANCHE DICK
Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION
Respondent

OCTOBER TERM, 1958

No. 58

PETITIONER'S BRIEF ON THE MERITS

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In the Supreme Court of the United States

BLANCHE DICK

Petitioner

VS.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION

Respondent

PETITIONER'S BRIEF ON THE MERITS

REFERENCE TO REPORTS

On June 23, 1958 the Supreme Court of the United States granted the petitioner's prayer that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered and rendered against the petitioner on the 7th day of February, 1958. The granting of the petition is reported as case number 957 at 2 L. Ed. 2d 1369. The opinion of the Eighth Circuit Court of Appeals is reported as case number 15,760 at 252 F. 2d 43.

JURISDICTION OF THIS COURT

The petitioner relies upon the provisions of Amendment VII of the United States Constitution which preserves for her the right of trial by jury and *28 U. S. C. A.* No. 2101 and No. 2106 to sustain the jurisdiction of this court. The petition for Certiorari was timely filed on April 28, 1958 and Certiorari was granted on June 23, 1958.

CONSTITUTIONAL PROVISIONS

The constitutional provision involved is Amendment VII found in *U. S. C. A.*, Constitution, page 379. It reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the common law."

QUESTIONS PRESENTED FOR REVIEW

Denial of trial by jury.

Can the Circuit Court of Appeals deny Mrs. Dick, the petitioner, a trial by jury where there is evidence in the record consistent with accidental death, and where a jury has found that the death was not a suicide, and where the trial judge has refused to set aside the verdict of the jury?

Refusal to follow state law.

Did the Circuit Court of Appeals have the right to refuse to follow the North Dakota law which for more than 50 years has held that the question of whether a death is suicidal is for the jury where there is evidence in the record consistent with accidental death? In this case the opinion of the Circuit Court of Appeals acknowledges that there was such evidence.

A CONCISE STATEMENT OF THE CASE

William Dick was a 47 year old farmer living on his farm near Englevale, North Dakota. On January 20, 1955, he died as a result of two shots from an old double bar-

reled shot gun. Death occurred in a silo shed at about 10 a.m., while he was in the process of doing his chores. This lawsuit was brought by his wife in a North Dakota State Court for recovery of the double indemnity benefits payable under two life insurance policies issued to the decedent in 1944 and 1949.

Mr. Dick was a happy, well adjusted man in good health. His only known ailment was a form of mild to moderate non-specific prostatitis (R. 30), but this illness would not prevent him from doing his work. He was bright and cheerful and his doctor was satisfied with his progress (R. 31). He was a man of modest means with no financial problems. He left no will (R. 9).

The night before he died he took the time to help his 14 year old daughter with her General Science studies, explaining to her the intricacies of a transformer (R. 18). He slept soundly, ate a hearty breakfast, milked his cows, and had planned to help his neighbor make sausage (R. 8). He had said or done nothing to indicate that he contemplated suicide (R. 59).

Mr. Dick had commenced to feed his cattle at the outside feed troughs just north of the silo (Pl. Ex. 7, R. 11). It was his practice to put silage in the troughs, get a tub full of ground corn and then spread it over the silage (R. 13). The cattle had been fed silage (R. 17), but the tub filled with ground corn was found a couple of steps from the feed troughs on the barn side of the fence (R. 16).

Several months prior to his death Mr. Dick had trouble with vicious dogs. A few sheep were lost and quite a few were mangled (R. 16). A fox had been seen and a badger had been killed in the barn lot (R. 9). The gun was kept in the barn (R. 9). It was at least 28 years old (R. 10).

On at least one occasion the gun had discharged accidentally (R. 34-36).

Most of the feed lot was visible from the point near the feed troughs where the unemptied tub of ground corn was found. The most direct access to the feed lot was through the barn and the south door of the silo shed (Pl. Ex. 7, R. 11).

Mrs. Dick drove their daughter, Dorothy, to school that morning, and after returning in about half an hour she took care of various household chores which would have to be done before going to the neighbors to help make sausage as she and her husband had planned (R. 8). When Mr. Dick did not come to the house she went to the barn to look for him and found his body in the silo room near the south exit (Pl. Ex. 7, R. 11; Pl. Ex. 11, R. 15).

There was a sprinkle of silage on the floor and on the steps of the silo shed. It was wet and more or less frozen (R. 13). Mr. Dick was wearing a jacket that was zippered up. He was wearing heavy fleecy gloves (R. 22). There was no blood on the gloves or the gun.

There were two wounds. The wound along the chest was a grazing wound (R. 22). It was *not* pointed at the heart or any other vital organ. The second was a head wound and it caused instant death (R. 26).

A screwdriver was kept in the shed for the purpose of opening the door because the knob was off (R. 9). Mr. Dick would have used this screwdriver if he intended to go out the south door of the shed. The sheriff who investigated did not know the length of this screwdriver (R. 21), nor did the sheriff ever have the screwdriver in his possession so as to determine whether or not the gun could be fired by using the screwdriver.

SUMMARY OF ARGUMENT

1. Under *Erie v. Tompkins* the federal court was required to follow the North Dakota law.

2. Where there is evidence that is consistent with accidental death the case must be submitted to the jury under the laws of North Dakota.

3. In North Dakota the presumption against suicide has the weight of affirmative evidence.

4. Entirely apart from the presumption there are at least seven inferences that the jury was entitled to draw from the evidence and these pointed only to accidental death.

5. The inference of suicide can only be drawn from the fact that both barrels of the gun were fired. Actually the opposite inference may be drawn from the same fact.

ARGUMENT

The petitioner, Mrs. Dick, started this lawsuit in the North Dakota state court. The New York Life Insurance Company removed it to the federal court because $7,500 was involved and there was diversity of citizenship. The jury found that the death was not a suicide. The trial judge refused to overturn the verdict. The circuit court granted judgment for the insurance company.

There were obvious questions of fact involved in this lawsuit and the circuit court's decision has denied to the petitioner her right to trial by jury under Amendment VII of the United States Constitution.

The Federal Court was required to follow the North Dakota law.

There can be no question but that the Eighth Circuit Court of Appeals was bound to follow the North Dakota law. *Erie v. Tompkins,* 304 U. S. 64, 82 Law Ed. 1188 has made that amply clear and the Eighth Circuit Court has itself acknowledged this:

> "Since the policy is an Arkansas Contract the case is controlled by the law of that state. Erie Railroad Co. v. Tompkins, 304 U. S. 64. Whatever the law as to burden of proof may be in this type of case in other states, the instructions given by the court conform to the law of Arkansas. The settled law of that state is 'that proof of death of an insured from injuries received by him raises a presumption of accidental death, within the meaning of an insurance clause insuring against injury by external, violent, and accidental means, and this presumption will continue until overcome by affirmative proof to the contrary on the part of the insurer.' When suicide is the defense the burden of estabiishing this fact is upon the defendant. The plaintiff is not required to prove that the death of the insured did not result from suicide."
>
> *Aetna Life Ins. Co. v. Newbern* (C. C. A. 8, 1942), 127 F. 2d 171.

In North Dakota suicide cases must be submitted to the jury where there is evidence consistent with accidental death. In North Dakota the presumption against suicide has the weight of affirmative evidence.

The Circuit Court's decision is in conflict with *all* relevant decisions of the North Dakota Supreme Court. Its decision is on an important question of North Dakota law. The North Dakota Supreme Court has held for 50 years

that suicide cases are to be submitted to the jury where there is evidence consistent with accidental death. Its first decision was *Stevens v. Continental Casualty Co.* (N. D. 1903), 12 N. D. 463, 97 N. W. 862. The court said:

> "With the burden of proof upon the defendant to show that the insured died from injury intentionally inflicted, ought the judge to have instructed the jury that the burden was sustained as a matter of law? 'It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences. It is only when no inferences are possible, except those which lead to one conclusion, that the jury can be required to find a proposition affirmatively established.' Anthony v. Accident Ass'n., 162 Mass. 354, 38 N. E. 973. That the person who shot the insured in this case intended to do so must not only be an inference arising from the facts proven, but any other inference must be excluded by the proofs."

That was the first North Dakota case on the subject. The second case was *Clemens v. Royal Neighbors of America* (N. D. 1905), 14 N. D. 116, 103 N. W. 402. In this case the insured talked to his religious advisor, wrote a note saying, "Bury me at Leonard. Kiss the children for me. Don't take this too hard." The lower court directed a verdict for the insurance company and the North Dakota Supreme Court held that this was proper.

> "The plaintiffs insist that these undisputed facts should have been submitted to the jury, to determine whether Clemens' death was caused by his own voluntary act or by other means. The presumption is that a death caused by unexplained means was not suicidal.

In the absence of proof, such death will be presumed to have been caused by accidental means. Stevens v. Continental Casualty Co., 12 N. D. 469, 97 N. W. 862, and cases cited. And the burden of proof is upon the insurer to show that death was caused in a manner or by means that exempt him from liability. Has the presumption of law that death was not caused by suicide been overcome by the defendant, as a matter of law? If so, the direction of a verdict was proper. If reasonable men, viewing these undisputed facts, might differ in their conclusions as to whether the deceased committed suicide, then the facts should have been submitted to the jury. *If there is no evidence in the record that can be said to be inconsistent with the conclusion of death by suicide, then the question was properly one for the court to direct the jury to find verdict for the defendant.* We think the facts all point to death by suicide, and are inconsistent with any other reasonable theory. If it be said that it might have been an accidental death, or one criminal by another, the note conclusively rebuts such possibility. The circumstances of meeting his employer, his shortage, and the impending exposure that must follow, the note, the position of the wound, the blood on the revolver and on the mirror, and that he was alone in the room, are sufficient facts, as a matter of law, to overcome the presumption against a death by suicidal means. A verdict for the plaintiff under such circumstances could not be sustained, and would be without any evidence to support it." (Emphasis supplied.)

Clemens v. Royal Neighbors (N. D. 1905), 14 N. D. 116, 103 N. W. 402.

The third North Dakota case on the subject is *Paulsen v. Modern Woodmen of America* (N. D. 1911), 130 N. W. 231. The insured was arrested for a violation of a criminal statute. That night while lying in his bed he apparently took strychnine and died. There was no evidence that anyone other than the decedent could have administer-

ed the poison. The court sustained the judgment against the insurance company and said:

> "The vital question is, therefore, whether, as appellant contends, the circumstances conclusively establish suicide, as a matter of law. If this question must be answered in the affirmative, it follows as a necessary conclusion that the court erred in submitting the case to the jury. In deciding this question we are controlled by certain well established rules. The presumption is that Paulsen did not commit suicide, but that the strychnine was administered through accident or mistake. And the burden is on defendant to overcome such presumption. Ordinarily the question of what inferences are deducible from the evidence is peculiarly a question for the jury, and it is only in rare instances that the court is justified in determining such question as a matter of law. If it can be said that reasonable men may fairly differ as to the inferences to be deduced from all the circumstances disclosed, it is a proper case for the jury. As said by the Supreme Judicial Court of Massachusetts: 'It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences. It is only when no inferences are possible, except those which lead to one conclusion, that the jury can be required to find a proposition affirmatively established.' Anthony v. Accident Ass'n., 162 Mass. 354, 38 N. E. 973.
>
> "Applying the foregoing rules or tests to the facts in the case at bar we are constrained to hold, as did the trial court, that the question was one of fact for the jury, and not one of law for the court, to decide. While, if we were the triers of the facts, our decision might have been contrary to that of the jury, we are not prepared to say that but one conclusion or in-

ference could properly be deduced from the facts. This being true our duty is plain under the law."

Paulsen v. Modern Woodmen of America (N. D. 1911), 130 N. W. 231.

The fourth North Dakota case and the most recent holding is *Svihovec v. Woodmen Acc. Co.* (N. D. 1939), 69 N. D. 259, 285 N. W. 447. By 1939 most of the jurisdictions throughout the United States had abandoned the presumption rule as it existed in North Dakota and counsel for the insurance company argued for a new and more modern rule that would deny to the presumption the weight of affirmative evidence. The North Dakota Court refused to accept this modern rule and said:

"The rule announced by this court in Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862, gave to the presumption in favor of accidental death the weight of affirmative evidence. It was there held that proof of death by gunshot wound, aided by this presumption, was sufficient to establish a prima facie case of accidental death, and that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or nonintentional injury. Defendant contends for a modification of this rule and its brief presents a scholarly and persuasive argument in support of that contention. Despite the logic of defendant's argument and the weight of the authority presented to support it, we feel we must adhere to the rule above set forth. That rule was affirmed by this court in Clemens v. Royal Neighbors, 14 N. D. 116, and it follows as a fair construction of sections 7934 and 7936 Compiled Laws of North Dakota, 1913."

Svihovec v. Woodmen Acc. Co. (N. D. 1939), 285 N. W. 447.

These four cases represent the North Dakota law on this subject. This has been the law in North Dakota for more than 50 years. At no time, either in the district court or in the circuit court did the insurance company cite a single North Dakota case holding that this case should not have been submitted to the jury. It was the position of the insurance company that the North Dakota rule was not applicable and that the court should apply what they described as "the modern rule and the best rule." The decision of the 8th Circuit is clearly in conflict with the North Dakota law. Under *Erie v. Tompkins*, 304 U. S. 64, 82 Law Ed. 1188 it was required to follow that law and this it did not do.

There is ample evidence in the record of accidental death.

This is not a case where the widow must rely upon the presumption alone and where all of the other evidence points to suicide. Even if the presumption could be cast aside there were at least seven established facts that indicated to reasonable men and women that this death was accidental.

1. There was absolutely no motive for suicide and none could be inferred from the evidence.

2. On the evening before he died Mr. Dick spent the hours quietly with his family, helping his 14 year old daughter with her general science studies.

3. He was a happy, jolly man who was free of worries and regrets.

4. He had been troubled with vicious dogs and other wild animals and so he kept his 28 year old shotgun in the barn. Just before his death, and while he was feeding his

cattle, he carried to the cattle feed troughs a tub of ground corn. Normally he would have lifted this over the fence and put it into the troughs. On the morning of his death he put it down, across the fence from the cattle, and unemptied. The inference is that he was interrupted in his labors and went to the barn to get his gun.

5. He could have slipped because the steps into the silo shed were wet and more or less frozen.

6. The gun was old and it had discharged accidentally before.

7. He was wearing heavy, fleecy gloves a finger of which could hardly be forced into the trigger guard of the gun. There was no blood on the gloves. His heavy winter jacket was zippered up. The only evidence of suicide in the record consists of the fact that both shots from the two barrels were fired. While the inference of suicide may be drawn from that one fact the opposite inference may also be drawn from the same fact, for if this were a suicide, then necessarily the jury would have to conclude:

(a) That Mr. Dick on the spur of the moment decided to kill himself.

(b) That he aimed his first shot at his heart and did not even take off his jacket to see where his gun was pointed.

(c) That his shot came nowhere near his heart but did inflict upon him a painful wound that would eventually have caused his death.

(d) That he did not stop to examine his first wound to see if it was mortal (because there was no blood on the gloves).

(e) That he would then have the strength and the will and the power to pull himself together and in some unknown manner blow off the top of his head with the second shot.

(f) That he would do all of these things while wearing heavy, fleecy gloves that could hardly be forced into the gun's trigger guard.

Perhaps the jury had the right to draw speculative inferences of this kind but they were not compelled to draw them.

We submit that all of the seven facts above set forth were amply established by the evidence. Indeed they were not contradicted. The circuit court in its decision acknowledges that there was evidence of accidental death for the court says:

> "The improbability of his being able to pull the triggers with bulky gloves on is offset by the strong probability that the screwdriver was used to push the triggers, and that he could not otherwise have reached the triggers so as to inflict the wounds he received."

Here the court is itself weighing the evidence. The screwdriver was of no importance whatsoever to the jury. It was not important enough for the investigating officer to even pick up or measure after the death. The circuit court has drawn a speculative inference from the screwdriver which the jury did not and was not compelled to draw.

CONCLUSION

The decision of the Circuit Court of Appeals has denied to Mrs. Dick her right to a trial by jury under Amendment VII of the United States Constitution. That decision is in

conflict with *all* relevant decisions of the North Dakota Supreme Court. This case is of importance to all practitioners in North Dakota. We submit that the petitioner is entitled to judgment as ordered by the North Dakota District Court and for her costs.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 58

BLANCHE DICK
Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION,
Respondent

RESPONDENT'S BRIEF ON THE MERITS

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BLANCHE DICK

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NEW YORK LIFE INSURANCE COMPANY, A CORPORATION

Respondent

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

The petitioner's statement of the case is inaccurate. It wholly omits certain very material facts which are undisputed. Hence this supplementary statement is submitted.

The petitioner, Blanche Dick, was beneficiary of two life insurance policies issued by the respondent to her husband, William Dick. Both policies provided for double indemnity benefits in the event of accidental death. The single indemnity benefits were paid after commencement of suit, leaving the only issue for trial the right to recover the double indemnity benefits (R. 40, 48-49).

Petitioner alleged and respondent denied that the insured's death "resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means", as limited and defined in the double indemnity provisions of both policies. As an affirmative defense, respondent alleged that the death of the insured resulted from suicide or self-destruction, making applicable the policy provisions that double indemnity benefits were not payable if death resulted from "self-destruction, whether sane or insane" (R. 5-6).

The action was tried to a jury resulting in a verdict in favor of petitioner for $7,500.00 (R. 49).

The insured's death occurred on January 20, 1955. His body was discovered by his wife when she entered the barn to call him. Receiving no answer, she entered the little silage shed between the barn and silo (Pl. Ex. 7; R. 11). It was then between 10:30 and 11:00 a.m. She saw her husband in the shed, lying on his back with his feet facing the south or outer door of the silo. She observed the wound on his head and knew he was dead. His double-barreled shotgun was lying near the body. He was dressed in blue overalls and jacket and had gloves on (R. 8, 9, 10).

She heard no shots from the shotgun. She testified her husband was experienced in the use of firearms, and had hunted every fall since 1926 for pheasants, deer, ducks and geese (R. 10).

Mrs. Dick called George Dick, a brother, who went to the silo shed and looked in. The deceased's left foot was on the floor and his right cocked against a 2 x 4 east of the south door. His forehead and eyes were completely gone. Plaintiff's Exhibit 11 (R. 15) is a picture posed by George Dick showing the location of the deceased's body

in the position it was lying when he saw it. The gun, which was a double-barrel 12-gauge shotgun with two triggers, one in back of the other, was lying about 3 feet from the body with the butt near the feet and the barrel alongside the head. The body was clothed in a blue bib overall, yellow flannel gloves, and work jacket with a zipper (R. 13, 14).

He found a concentration of shot pellets in the northwest corner of the shed and shot marks in the southeast corner on the east wall, south of the door, 3 or 4 feet from the floor. Pieces of human flesh were spattered about, mostly on the south door and above on the roof (R. 13).

The decedent's gun was usually kept in the barn. He had gone hunting every fall since 1926 for pheasants, deer, ducks and geese, and on these trips used the shotgun found near the body. He was experienced and careful in the use of firearms (R. 9, 10, 14).

Mr. Dick was very seldom a moody man. If he had anything on his chest, he would get it off and forget about it. These moody intervals were not frequent (R. 13, 14).

Mr. Noice, the County Sheriff, arrived at the farm about 11:00 a.m. He observed what he believed to be powder burns about an inch above the decedent's left ear. The gun was about 18 inches from the body with the stock toward the feet and the barrel along the body. The end of the muzzle was at about the chest. He took possession of the gun. It was a 12-gauge double-barrel Stevens gun with two triggers, placed one ahead of the other. The front trigger fires the right barrel and the rear trigger the left barrel. It weighed about 7 pounds. There is a safety device located on top of the stock behind the barrels and behind the device which breaks the gun. Before the gun can be

fired, the safety device must be released by pushing the button ahead. It would not fire otherwise (R. 18, 19).

While in the shed, the sheriff picked up the gun. It was dry and clean. He broke it and found two discharged 12-gauge shells in the chambers, which he removed. He observed a screw driver 8 to 10 inches long lying to the left of the gun barrel and about 8 to 10 inches from it (R. 20).

The sheriff made numerous tests with the gun to see if it would fire by jarring, pounding, or dropping it. All these tests were made with the gun off safe. In no instance did the triggers fire during these tests. They were made in the basement of the Courthouse. The gun was held with the muzzle pointing toward the ground and dropped a distance of about 10 inches to a board. This test was made about 10 times. The gun was then held with the butt about 10 inches from the floor and dropped to a board. This test was made 8 or 10 times. Next, the gun was placed in normal shooting position against the right shoulder with the barrel in the sheriff's left hand and the stock in his right hand. He struck it against the board 3 or 4 times. The butt was placed on the floor and the barrel allowed to fall on a board (R. 19, 20). Tests of the trigger pull were also made by the sheriff with a spring scale. It required approximately 7 pounds pull to fire the triggers. This test was made twice with both triggers, with the same result (R. 20).

After the body was removed to the funeral parlors, the sheriff observed for the first time a wound on the left side of the decedent's body. It was about 5 inches long, pear-shaped and grazed the ribs. Defendant's Exhibit 17 (R. 25), shows the wound. The photograph was taken about two hours after the body was brought to the funeral home (R. 21).

Dr. Veitch, the County Coroner, accompanied the sheriff to the Dick farm and made an investigation as part of his official duties. He stated that the decedent's forehead and eyes were gone. The bone and tissue in front of the ears were gone, with the brain contents in plain sight. There was some red meat tissue or blood spatter on the south door and also on the north wall, mostly on the upper half with the area of greatest concentration on the south door (R. 23, 24).

About an hour and a half after he was at the farm, he examined the body in the funeral home when the clothing had been removed. He found another wound in the chest. It was a furrow type on the left lateral chest wall, extending about 5½ inches in length. The top was about 2½ to 3 inches below the left nipple with the greatest width about 2½ inches (R. 24).

He testified the wound to the head caused immediate death. The chest wound did not do so. It would have eventually caused death within one day to two weeks. The chest wound was terrifically painful, but did not result in loss of consciousness. Its chief consequence would be pain. The deceased would have the capacity to pull the trigger of a shotgun after receiving the chest wound (R. 26).

When he examined the body in the funeral parlor, the doctor observed definite powder marks on the skin of the left forehead in front of the ear. There was a high concentration of a powder burn extending a half inch to an inch (R. 30).

As a physician, he attended the deceased 8 times between September 13, 1954 and December 30, 1954. Mr. Dick had a mild to moderate non-specific prostatitis, was

tired and felt pepless. He was put on sulpha therapy and received hormone injections each time after the first visit to the doctor. His illness did not prevent him from doing farm work. He would do it in spite of the misery he was having (R. 30, 31).

Dr. Veitch completed and signed Defendant's Exhibit 9 (R. 35), in connection with petitioner's claim for benefits under the policies. It shows death was due to "Suicide".

A firearms expert testified that when fired at close range, the burning powders and gases from guns leave marks called powder burns. He found powder burns on the fabric of the decedent's outer jacket. These marks were at the holes toward the front of the jacket, and there were none at the hole to the rear. These burns were about an inch on each side of the top and bottom of the front hole. The direction of the shot charge, according to the holes present in the jacket, was front to rear (R. 32).

An inquest on the death of William Dick was held by a coroner's jury on January 28, 1955. A verdict of "suicide" was returned. The verdict was annulled and set aside by order of the District Court of Ransom County, North Dakota, on May 19, 1955, for want of compliance with statutory provisions regarding the time and manner of impanelling and administering the oath to the jury (R. 34).

ARGUMENT

I.

The Court of Appeals followed state law.

The assertion is made in petitioner's brief that the Circuit Court's decision is in conflict with all relevant decisions of the North Dakota Supreme Court. To the contrary, the Court of Appeals expressly recognized its obligation to follow the substantive law of the state (R. 57-58). Petitioner's quarrel is with the result reached by the court after analyzing the evidence rather than its failure to apply the North Dakota law to the evidence.

The North Dakota rule is well established. It is clearly set forth in *Svihovec v. Woodmen Acc. Co.* (1939), 69 N. D. 259, 285 N. W. 447, where the court said:

> "The rule announced by this court in Stevens et al. v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862, gave to the presumption in favor of accidental death the weight of affirmative evidence. It was there held that proof of death by gunshot wound, aided by this presumption, was sufficient to establish a prima facie case of accidental death, and that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or nonintentional injury. Defendant contends for a modification of this rule and its brief presents a scholarly and persuasive argument in support of that contention. Despite the logic of defendant's argument and the weight of the authority presented to support it, we feel we must adhere to the rule above set forth. That rule was affirmed by this court in Clemens et al. v. Royal Neighbors of America, 14 N. D. 116, 103 N. W. 402, 8 Ann. Cas. 1111, and it follows as a fair construction

of sections 7934 and 7936, Compiled Laws of North Dakota, 1913."

285 N. W. 449.

This is the last expression of our court and two of the previous decisions are cited in support of the holding.

It is significant that in both the *Clemens* and the *Svihovec* cases the plaintiff did not prevail. In *Clemens* the trial court directed a verdict for the defendant insurance company which was affirmed on appeal. The court said:

> "Has the presumption of law that death was not caused by suicide been overcome by the defendant, as a matter of law? If so, the direction of a verdict was proper. If reasonable men, viewing these undisputed facts, might differ in their conclusions as to whether the deceased committed suicide, then the facts should have been submitted to the jury. If there is no evidence in the record that can be said to be inconsistent with the conclusion of death by suicide, then the question was properly one for the court to direct the jury to find a verdict for the defendant. We think the facts all point to death by suicide, and are inconsistent with any other reasonable theory."
>
> 103 N. W. 404.

In *Svihovec* the judgment entered upon a jury verdict for the plaintiff was reversed and the case dismissed. The court found that the facts and circumstances surrounding the insured's death could not be reconciled with any *theory* of accidental or nonintentional injury.

> "The only theory of accidental death presented to the court is that the shot or shots which killed these men were fired by some hunter in the neighborhood. For us to assume, however, that a stray bullet or bullets, following a random course across the countryside, could set in motion a chain of circumstances so purposeful in implication, would take us away from

the field of rational inferences based on human experience and into that of speculation upon fantastic possibility. *We can conceive of no theory of accidental or nonintentional injury consistent with the proof.* We determine, therefore, that it is shown as a matter of law, that the death of the insured was due to an intentional act and was not accidental; that under the exceptions of the policy sued upon, plaintiff's right to recover is thereby defeated." (Italics supplied.)

285 N. W. 449-450.

The Court of Appeals in the instant case, after studying and outlining the evidence, expressly and aptly referred to the *Svihovec* case and applied the rule there stated.

"The Supreme Court of North Dakota has held that proof of death by gunshot wound plus the presumption of accidental death makes a prima facie case that death was accidental, and 'that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or nonintentional injury.' Svihovec v. Woodmen Accident Co., 69 N. D. 259, 285 N. W. 447, 449.

"If the facts and circumstances surrounding the death of the insured can be reconciled with any reasonable theory of accidental injury the judgment appealed from should be affirmed, but if they cannot the judgment should be reversed" (R. 61-62).

II.

The undisputed facts are consistent only with suicide.

The evidence clearly establishes certain undisputed facts which are wholly inconsistent with any *reasonable* theory of accidental death. As Circuit Judge Sanborn clearly points out, the plaintiff is not entitled to the benefit of inferences

which are unreasonable or which are opposed to the undisputed physical facts (R. 58).

The evidence definitely establishes these facts:

1. William Dick was an experienced hunter. He had hunted practically every fall since 1926 for pheasants, ducks, geese and deer. He was thoroughly familiar with shotguns and their operation and was careful in the handling of firearms. The gun which caused his death was the only one he owned.

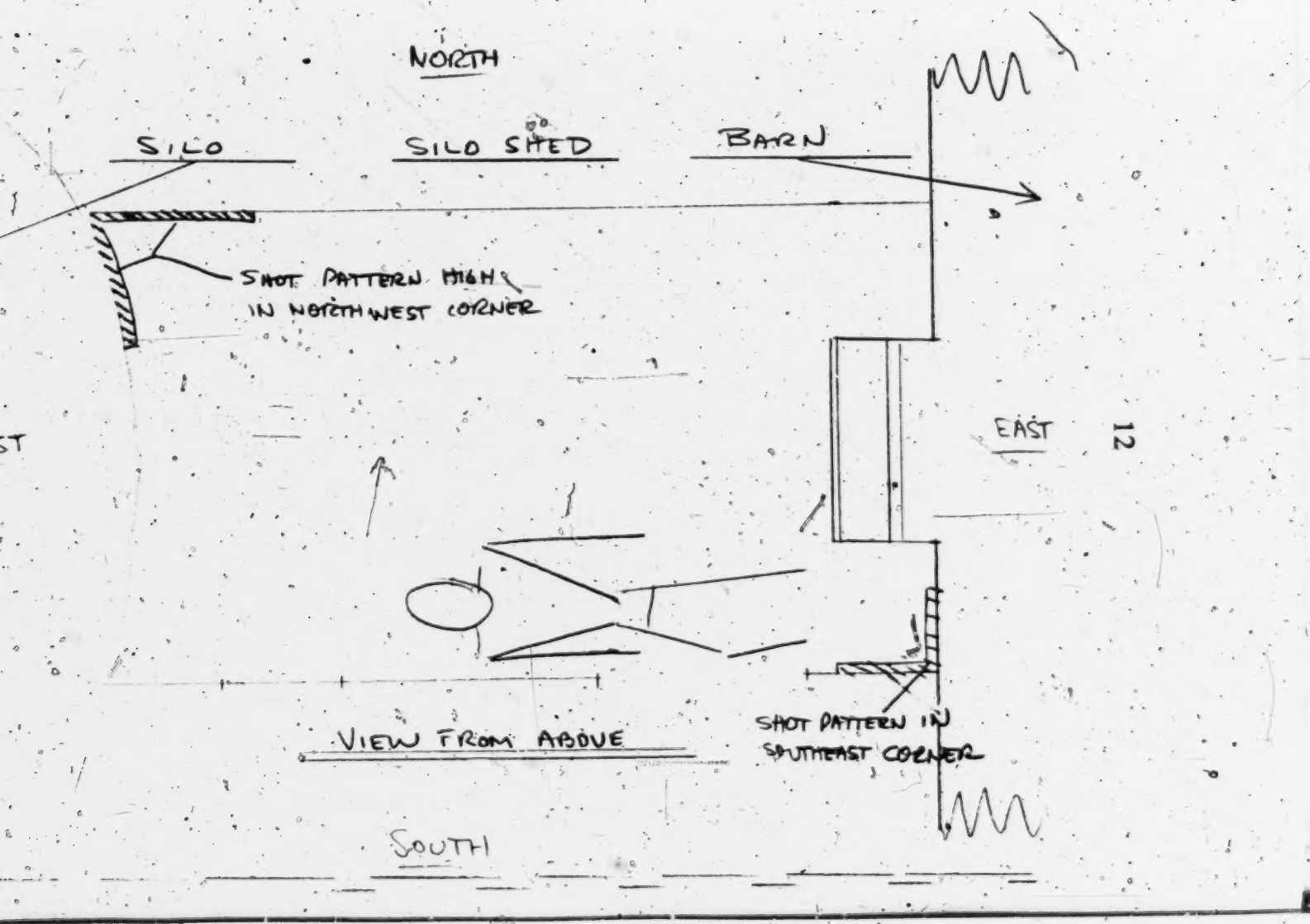
2. After shells are inserted in the chambers and the gun breech closed, the weapon automatically goes on "safe". It could not be discharged without manually pushing the safety button forward from safe position.

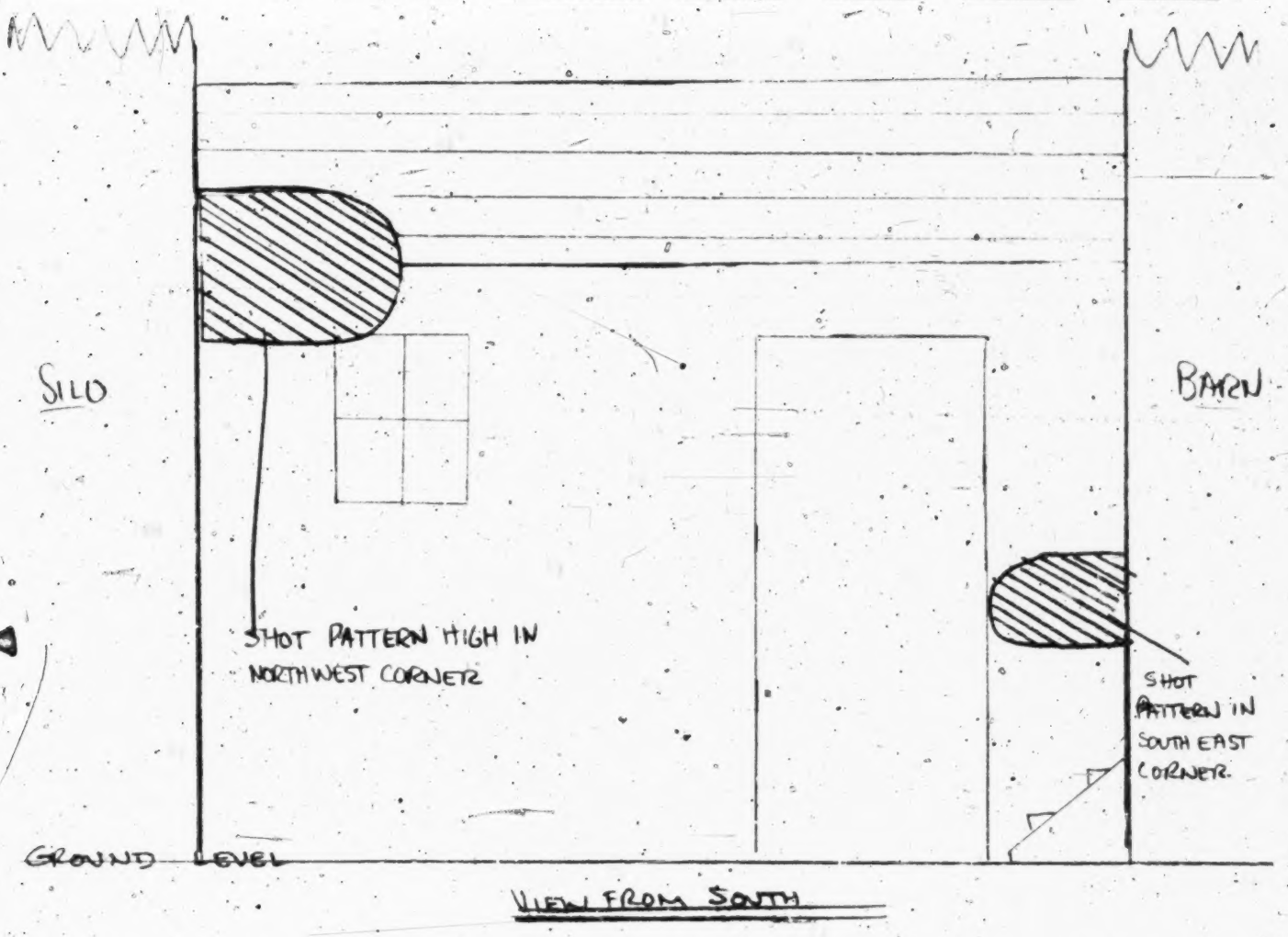
3. Tests made by the sheriff immediately afterwards show that it required 6 to 7 pounds pressure on each trigger to fire the gun; that with the gun "off safe", it could not be fired by dropping, jarring or striking it forcibly against an object. It was in good operating condition. When picked up in the shed, the gun was dry and clean.

4. Mr. Dick was found on his back in the silage shed with his feet near the door leading from the shed to the feed lot. Two discharged 12-gauge shells were in the chambers, indicating two shots had been fired in the shed. His shotgun lay alongside to the left and parallel with his body. A screw driver 8 to 10 inches long was found to the left of the gun.

5. There were shot pellets in the northwest corner and on the southeast corner of the shed. The latter were 3 or 4 feet from the floor. Tissue from Mr. Dick's head was in the southeast corner. There was some meat tissue and blood spatter on the south door and also on the north wall.

The following rough diagrams prepared by us illustrate graphically the location of the body and the shot pattern.


NORTH
SILO
SILO SHED
BARN
SHOT PATTERN HIGH IN NORTHWEST CORNER
EAST
12
VIEW FROM ABOVE
SHOT PATTERN IN SOUTHEAST CORNER
SOUTH



VIEW FROM SOUTH

6. Two wounds were found on the body, one in the chest and one on the forehead. The chest wound was mortal but not immediately fatal. It was terribly painful but would not have caused loss of consciousness. After the chest wound, the insured could still have fired the gun. The wound to the head caused instant death.

7. Both shots left powder burns. Powder marks were found on the front of the outer jacket worn by the insured around the hole where the shot entered. The direction of the shot charge is from front to rear. Definite powder marks were also found on the skin of the left forehead in front of the left ear; that "they extended a half inch to an inch, quite a high concentration of a powder burn." Both shots were fired at extremely close range.

8. The clothing worn by Mr. Dick was received in evidence. Examination of the underwear shows that blood from the chest wound traced two courses—one down from the wound toward the crotch—the other around the back of the underwear.

9. The insured had been treated by his physician 8 times between September 13, 1954 and December 30, 1954, for a form of mild to moderate non-specific prostatitis. He complained of being tired and pepless. The doctor administered sulpha therapy or hormones by injection. Death occurred January 20, 1955. The proof of death signed by the physician states that death was due to "Suicide".

In the language of the decision in the *Svihovec* case, can the facts and circumstances surrounding the death of the insured be reconciled with any reasonable theory of accidental death. It is earnestly submitted that they cannot.

The insured had used his gun for hunting since 1926. He was a husky, strong man, experienced and careful in the use of firearms. There is a total dearth of any evidence pointing to any legitimate use of the gun. The testimony is vague as to where the gun was kept, except the wife's statement that it was usually kept somewhere in the barn. Realizing the necessity for some proof justifying the use of the gun, evidence was received, over objection, that within a year previous dogs had killed or chewed up sheep on the farm. There is no testimony that the dogs were in the neighborhood within such a close interval of time as would indicate the necessity for protecting the sheep. Mrs. Dick, who was alone on the farm, did not hear any noise from any dog pack. She did not testify to any indication of a disturbance among the livestock on the farm when she went out to get her husband. There was no testimony as to the presence of any wild animals or game in the vicinity at the time.

Testimony was also received, over objection, that on November 8, 1954, the insured's gun might have accidentally discharged while he was hunting. The witness testified that he did not know whether the deceased had pulled the trigger or not. On cross examination the insured's brother stated "He might have thought he had the gun off safe when he didn't, or he may have pulled the trigger and not be aware of it" (R. 36).

This evidence was apparently offered for the purpose of showing that on January 20, 1955, the gun *might* have accidentally discharged. The testimony of the sheriff as to the efforts which he made to discharge the weapon shows that whatever may have been the gun's condition previously, it was in good operating condition immediately after Mr. Dick's death.

No credible evidence or evidence from which any reasonable inference could be drawn, was offered indicating that the insured, while in the silo shed, had accidentally discharged the gun as the result of falling or stumbling. On the contrary, the evidence affirmatively shows that there was only a sprinkle of silage on the floor and some on the steps. There were no bare spots or marks to indicate any slipping or falling. No testimony was offered as to any nails, hooks or projections in the shed which might have accidentally discharged the gun. No explanation is offered as to why death occurred in the shed, if the insured intended to shoot some animal, if any were present in the vicinity.

The fact that shot pellets, blood and tissue spatter were found midway on the wall in the southeast corner and high in the northwest corner of the shed indicates quite clearly that both barrels of the gun were fired. It also demonstrates quite clearly that the gun was discharged while the insured was in a standing position, stooping over, with the gun pointed upward when he inflicted the chest wound; and that he was stooped over or kneeling with the long axis of the shotgun more nearly horizontal when the fatal head wound was inflicted. These physical facts offered as part of the plaintiff's proof quite definitely rule out an accidental discharge occasioned by or resulting from the insured's stumbling or falling while entering or in the shed. The fact that the shot concentration was found in different corners of the building at approximately a 180 degree angle and at differing heights from the floor would seem to exclude any possibility that there could have been an accidental discharge of both barrels. It is submitted that plaintiff's own evidence wholly failed to establish the acci-

dental discharge of the gun. In fact, it is inconsistent with any theory of death except that of self-destruction, and a verdict could have been directed for the defendant at the close of testimony were it not for the artificial aid given the plaintiff by the presumption against suicide.

When examined by the sheriff in the shed the gun was dry. When he broke it, he found two discharged shells, which he removed. The screwdriver which he found lying to the left of the gun barrel could have been used by the insured to fire the triggers.

There is no question but that each shot charge struck the insured in a different area of the body. There was a furrow type wound in the left lateral chest wall, below the nipple. Another charge from the gun had blown off most of the decedent's forehead and the eyes were gone. Dr. Veitch testified that the chest wound, while painful, did not result in loss of consciousness, but that the deceased would have the capacity to pull the trigger after receiving this wound. The blood stains present on the deceased's underwear, running from the wound down toward the crotch, indicate conclusively that Mr. Dick was in an upright position—either standing or kneeling *after* the chest wound and before the head wound. The wound to the head, of course, caused immediate death. The sequence of the shots is therefore clear. The chest wound was received first and thereafter the head injury.

The gun was a 12-gauge, double-barrel Stevens. It was equipped with two triggers placed one ahead of the other. The front trigger fired the right barrel and the rear trigger the left barrel. When the gun is broken and shells inserted and the breech closed, it automatically goes on safe. Before it can be fired a safety device on the top of the stock must

be released by pushing a button forward. Until this is done neither trigger can be fired.

Immediately after taking the gun into his possession, the sheriff made numerous tests to determine whether the gun could be accidentally fired. It is clear from the undisputed evidence that the gun was in a good, safe mechanical operating condition and could not be discharged without the intervention of a human agent. In the face of testimony that the insured was experienced and careful in the use of firearms, it is inconceivable that he would carry the gun into the shed in a position to fire upon pulling the triggers. Even if he did so, the tests made by the sheriff, and the strong trigger pull would seem to rule out accidental discharge due to falling or stumbling, or some other cause. The theory may be advanced by the plaintiff that the insured was dragging the gun by the barrel and bumping the stock along the ground, thereby accidentally discharging it. It is inconsistent with the known fact that the insured was a husky man, and any hunter who had hunted for nearly 30 years would not handle a gun in this fashion. Even though the first shot were conceded to be accidental, no theory of accident can explain the second shot.

A more reasonable hypothesis is that the insured placed the shells in the chamber, deliberately took the gun off safe, and then discharged the first barrel, resting the butt on the ground and placing the end of the barrel against his left chest in the vicinity of the heart. When this shot charge was not fatal, he then placed the gun with the muzzle against his head, resulting in instant death.

Both the sheriff and the doctor testified as to the presence of powder burns on the skin of the left forehead in front of the ear. Dr. Veitch said there was a concentration of a powder burn. A firearms expert called by the

defendant found powder burns on the fabric at the front of the decedent's outer jacket and none at the hole to the rear of the jacket through which the pellets had gone. He placed the direction of the shot charge from front to rear. These powder burns indicated that the muzzle of the gun was held close to the chest and also to the head when the explosions occurred. Such a coincidence could not occur through accident, but only as the result of deliberate design. To attribute the presence of these powder burns to accident would be fantastic. In the case of *New York Life Ins. Co. v. Trimble* (C. C. A. 5th), 69 F. 2d 849; Cert. Denied 293 U. S. 561, 79 L. Ed. 661, 55 S. C. 72, the evidence showed that there were powder burns in and immediately around the wound where the bullet entered, indicating that the weapon was held against the right temple. The court there said:

> "In a case where the insured holds a pistol against his temple and shoots himself with it, the plaintiff who relies on the theory of accident in a suit on the policy, is indeed under a heavy burden."
>
> 69 F. 2d 849, 851.

The hypothesis of accidental death is wholly inconsistent with the facts established by the defendant through uncontroverted evidence. The only testimony offered by the plaintiff came from close relatives of the deceased, his wife, daughter, brothers and nephew. It established nothing much more than that some of the usual motives which exist where suicide is claimed are not present here. It is pointed out by the petitioner that the insured was usually a happy, jolly man, and tended to look on the light side of things. There was, however, testimony on direct examination by the decedent's brother that he was moody at times.

As the witness put it, "He was very seldom a moody man". The witness also testified, "If he had anything on his chest, he would get it off and forget about it" (R. 14).

The decedent had consulted Dr. Veitch professionally 8 times for his prostate trouble. Mrs. Dick was aware that her husband was consulting a doctor but did her best to minimize the seriousness of it by referring to it as a "Check up". She knew of only two trips, when in fact there were 8, tending to indicate that her husband preferred not to disclose the other treatments. It is a reasonable inference that he regarded his illness seriously and that it was a cause of concern to him.

It is a matter of common knowledge that persons who have abundant reasons to be satisfied with their lot in life do commit suicide. It was not necessary for the defendant to prove a motive in this case for suicide, although evidence was offered of the insured's prior ill health.

> "A motive for suicide is helpful to the defense but is not essential. Aetna Life Ins. Co. v. Tooley, supra; Burkett v. New York Life Ins. Co. (C. C. A.) 56 F. 2d 105. This is so because in this life *men who have no apparent motive for it do commit suicide.* Perhaps always in the case of a sane person who commits suicide there is a motive; but in many cases the motive is not, and possibly could not be proven. And so here we leave out of consideration any question of motive for suicide, and assume there was none. In our opinion the circumstances in this case are all consistent with the theory of suicide, and are all inconsistent with any but a *fanciful* theory of accident." (Italics supplied.)
>
> *New York Life Ins. Co. v. Trimble* (C. C. A. 5th), 69 F. 2d 849, 851.

> "The fact that powder burns were in the wound, and extended only slightly beyond the edge of it, indicat-

> ed, according to the uncontradicted testimony, that the pistol was held against the temple, or very close to it. This evidence certainly is consistent with the theory of suicide. But it is said that Tooley had no motive to take his own life, because he was successful in business, had no financial or domestic troubles, and was interested in providing a place in the business world for his sons. However, it is not to be denied that successful businessmen, living in pleasant surroundings, do commit suicide. Ill health and a depressed or disordered mental condition frequently furnish the motive for suicide, even among the prosperous and those who have every reason to be satisfied with their lot in life. *There is not a circumstance tending to show* that in this case death was the result of accident." (Italics supplied.)
>
> *Aetna Life Ins. Co. v. Tooley* (C. C. A. 5th), 16 F. 2d 243, 244

Perhaps the most conclusive fact in the case which definitely eliminates any theory of accident is the uncontroverted evidence that two shells were exploded in the little shed. Assuming for the sake of argument that the first shot might have been accidental, it is inconceivable on any rational theory that both triggers could have been accidentally discharged. It is straining one's credulity to conjecture that both shots would have inflicted injury to the decedent's body unless there was deliberate design on the part of the insured to take his own life.

The appellate court upon this record reached the conclusion that the judgment could not stand.

> "One can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one barrel and then with the other stretches credulity beyond the breaking point.
>
> * * * * *

> "Our conclusion is that the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury. Compare, Burkett v. New York Life Ins. Co., 5 Cir., 56 F. 2d 105, and Svihovec v. Woodmen Accident Co., supra" (R. 61-62).

To paraphrase what is said in the *Svihovec* case, any inference of accidental death from the known facts would "take us away from the field of rational inferences based on human experience and into that of speculation upon *fantastic* possibility".

CONCLUSION

The ruling by the District Court or the Court of Appeals where a review of the facts is sought by a motion for directed verdict made at the close of all the evidence presents a question of law. No denial of trial by jury is involved where the court exercises its inherent right to pass upon the sufficiency of the evidence. The Court of Appeals followed the applicable North Dakota decisions in cases of this character. Its determination that under the evidence no question of fact for the jury was presented is supported by the uncontroverted evidence. No other conclusion is possible, and its decision should be sustained.

Respectfully submitted,

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